FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 74-1589

GENERAL ELECTRIC COMPANY,

Petitioner,

v.

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

Respondents.

No. 74-1590

MARTHA V. GILBERT, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO-CLC, et al.,

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v.

GENERAL ELECTRIC COMPANY,

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On Writs of Certiorari to the United States Court of Appeals for the Fourth Circuit

Supplemental Brief for Martha V. Gilbert, International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC, et al., Respondents in No. 74-1589 and Petitioners in No. 74-1590 on Reargument

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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INTRODUCTORY STATEMENT

We welcome the opportunity to update our earlier brief [1] and to analyze in greater depth the various

[1] We attach as Appendix A, pp. 1a-5a, a current list of court decisions and arbitration awards applying Title VII to issues of income maintenance during pregnancy-related disabilities, together with a list of law review comments and conforming collective bargaining agreements.

principles of non-discrimination which support the judgment below and provide the answers to the wide ranging challenges advanced by GE and *amici curiae*.

These challenges raise important issues which are only now coming to the fore in the rapidly developing law of discrimination because of race, sex, nationality or religion. One issue is whether, or the extent to which, an irrational response to physical differences, as for instance sickle cell anemia in an employee, constitutes discrimination because of race.[2] Another issue is whether differences in pensions based on differences in longevity between black and white, which is equal to differences in longevity between male and female,[3] is prohibited by Title VII. In handling these problems, courts are beginning to develop principles with respect to "sex averaging" or "race averaging",

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[2] *Smith* v. *Olin Mathieson*, 535 F.2d 862 (5th Cir. 1976), revs'g in part and reman'g 10 FEP Cases 62 (USDCWD La. 1974). Cf. *Woods* v. *Safeway Stores*, 13 FEP Cases 114 (U.S.D.C.E.D. Va., 1976) holding that discharge of a black employee who grew a beard on the advice of his dermatologist in the treatment of a condition of pseudofolliculitis barbae ("PFB") which afflicts, almost exclusively, males of the black race, did not violate Title VII.

[3] Compare, *Peters* v. *Missouri-Pacific RR Co.*, 483 F.2d 490, 492 (5th Cir. 1973), cert. den. sub. nom.; *Missouri Pacific RR Co.* v. *Peters*, 414 U.S. 1002 (1973), holding that mandatory retirement of black firemen at age 65, or whites at 70, discriminated against black firemen in violation of Title VII, with *Fillinger* v. *East Ohio Gas Co.*, 4 FEP Cases 73 (U.S.D.C.N.D. Oh. 1971), parallel holding respecting females. The average lifespan in the United States in 1968 was 71.1 years for whites, 63.7 for non-whites, 74.0 for females, 66.6 for males. U.S. Department of Commerce, Social and Economic Statistics Administration, Bureau of the Census, Current Population Reports, Special Studies, Series P-23, No. 49, issued May 1974, p. 44, Table 2.17, Estimated Average Length of Life (Years) by Race and Sex: United States 1900 to 1969.

"overly categorized distinctions",[4] "sex-plus" or "race plus", and the duty of an employer to differentiate between stereotyped notions and true fact in making decisions affecting the economic life of employees. We have collected and attempted to arrange the principles as they are now emerging from the decisions of the courts, legislative histories, and law review commentators. The tremendous importance of the law which develops with respect to these problems has led us to stress the facts of the instant case and the finding of discriminatory motivation (see Gilbert original brief pp. 86-100) which warrant an affirmance without the need to define the reach of the various aspects of law which touch upon the issues raised by GE.

We therefore do wish to emphasize that this is not a class suit presenting the validity of all exclusions of pregnancy disability from disability plans in the United States, as GE and its supporting *amici* are attempting to make it. Although, admittedly, there are large numbers of cases involving employers pending before the courts and before administrative agencies, many of which are being held inactive awaiting the decision of this Court in this case,[5] each of these cases will be afforded its own day in court.

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[4] *Wetzel* v. *Liberty Mutual*, 511 F.2d 199, 208 (3d Cir. 1975), vacated 96 S.Ct. 1202 (1976).

[5] Two district courts, although noting in their opinions that this Court had granted certiorari on this issue, have refused to delay decision pending a ruling by this Court and have ruled on the merits and enjoined continued denial of benefits. *Payne* v. *Travenol Laboratories Inc.*, 12 FEP Cases 770 (USDCND Miss. 1976); *Guse* v. *J. C. Penney Co.*, 409 F. Supp. 28, 12 FEP Cases 9, 13-15 (E.D. Wis. 1976). The Courts of appeals, similarly, after noting the grant of certiorari by this Court have continued to affirm judgments based on findings that denial of benefits violates Title

I.

Washington v. Davis held that the constitutional standards of equal protection differ from the statutory standards of Title VII in that a "rational" basis suffices to validate, under the constitution, but not under Title VII, class neutral practices which have a disparate impact on a disadvantaged class but are not purposefully discriminatory. This holding renders Geduldig v. Aiello inapplicable, and sustains the determination that GE's denial of disability benefits violated Title VII.

This Court, in *Washington* v. *Davis*, 96 S.Ct. 2040 (1976), ruled that the constitutional standards for determining discrimination under the equal protection constitutional guarantee are different from the statutory standards for determining discrimination under Title VII. This Court stated (at p. 2047):

> "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today."

The statutory standard was characterized as "more rigorous" (96 S.Ct. at 2051). The role of courts in enforcing Title VII was described as involving "a more probing judicial review of, and less deference to, the *seemingly reasonable acts*" of employers "than is appropriate under the Constitution" where disparate

VII. *Hutchinson* v. *Lake Oswego School District*, 519 F.2d 961 (9th Cir. 1975) pet. for cert. pending, No. 75-568. *Berg* v. *Richmond Unified School Dist.*, 528 F. 2d 1208, 11 FEP Cases 1285 (9th Cir. 1975); pet for cert. pending No. 75-1069. Other courts have decided the merits in favor of the female class but withheld entry of an injunction pending decision by this Court. *Polston* v. *Metropolitan Life Ins. Co.*, 11 FEP Cases 380, 388 (USDCWD Ky. 1975).

impact upon a disadvantaged class "without discriminatory purpose, is claimed" (96 S.Ct. at 2051, emphasis supplied). A "rational" basis, this Court ruled in *Davis* v. *Washington*, will overcome a constitutional challenge to legislation and official acts which are not purposefully discriminatory but which have such disparate impact. However, it will not overcome a statutory challenge under Title VII. Speaking to the constitutional standard, this Court stated that it had never "held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because" of disproportionate impact upon some persons protected by that clause (96 S.Ct. at 2049). But this Court was equally emphatic in speaking to the statutory standard for challenges to employer practices having a disproportionate impact upon a protected class. This Court stated:

> "Under Title VII, Congress provided that * * * discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices."

96 S.Ct. at 2051).

In the context of the testing program involved in *Washington* v. *Davis*, the existence of a "rational" basis for the tests foreclosed the constitutional challenge, whereas a "rational" basis would not have been a defense under Title VII. Rather, under Title VII, tests with a discriminatory impact could survive challenge only by showing the business necessity for the tests by job validation under the EEOC guidelines approved in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 465 (1975).

We believe *Washington* v. *Davis* supports affirmance in the instant case. GE's exclusion of pregnancy-related disabilities from the coverage of its otherwise all-inclusive disability benefits program had a disparate and discriminatory effect on GE's female employees—indeed only female employees suffered from the impact of the exclusion. The district court described this case as involving "disparate treatment of persons, otherwise similarly situated, on the basis of a particular condition, the peculiarity of which is both irrelevant to the purpose of the company program and ineluctably sex linked" (Jt. Pet. 37a). The finding of the district court as to the manner in which the exclusion had a disparate and discriminatory effect on females is as follows (Jt. Pet. 28a-29a):

> "While pregnancy is unique to women, parenthood is common to both sexes, yet under G.E.'s policy, it is only their female employees who must, if they wish to avoid a total loss of company induced income, forego the right and privilege of this natural state. * * * Indeed, under G.E.'s policy the consequence of a female employee exercising her innate right to bear a child may well result in economic disaster, as in the case of at least one of the witnesses who appeared before the Court.[10] No such consequences would befall a male employee who chose to subject himself to a selective operation, such as a vasectomy or cosmetic surgery. Thus, women are required to undergo the economic

" [10] This G.E. employee, who became unintentionally pregnant, worked until five weeks before the birth of her child. Being precluded from disability benefits, and without other funds, she resorted to Welfare Aid, but prior to receiving same, suffered the cessation of electric and gas service for her home, along with its attendant deprivations including loss of heat and inability to adequately provide for her family."

> hardship of the disability which arises from their participation in the procreative experience. The disability is undisputed and inextricably sex-linked. To isolate such a disability for less favorable treatment in a scheme purportedly designed to relieve the economic burden of physical incapacity is discrimination by sex.

Similarly, the Ninth Circuit in *Hutchison* v. *Lake Oswego School District No. 7*, 519 F.2d 961, 965 (9th Cir., 1975) pet. for cert. pending No. 75-568 stated:

> "Clearly, a sick leave policy which excludes from coverage absences related to pregnancy or childbirth adversely and disparately affects women with respect to employment benefits."

Under the construction placed on Title VII by this Court in *Washington* v. *Davis*, this disparate and discriminatory impact on females can be upheld only if GE can show that it meets the Title VII requirement of being essential to the conduct of its business in some way other than cost, (see Gilbert original brief, pp. 139-143). No other "rational" basis can suffice as a defense to its invalidation. But GE has never advanced any claim that the exclusion had any essential relation to its business, and obviously could not.

The court below, in deciding the instant case and distinguishing *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), applied exactly the same analysis of the difference between constitutional standards under the Equal Protection Clause and statutory standards under Title VII as this Court enunciated in *Washington* v. *Davis*. The court of appeals stated (Supp. Br. Jt. Pet. 9a-11a):

> "There is a well-recognized difference of approach in applying *constitutional* standards under

the Equal Protection Clause as in *Aiello* and in the statutory construction of the 'sex-blind' mandate of Title VII. To satisfy constitutional Equal Protection standards, a discrimination need only be 'rationally supportable' and that was the situation in *Aiello,* as well as in *Reed* and *Frontiero.* * * * Title VII, however, authorizes no such 'rationality' test in determining the propriety of its application. It represents a flat and absolute prohibition against all sex discrimination in conditions of employment. * * * It authorizes but a single exception to this statutory command of non-discrimination and that is a narrow one which, to be upheld, requires a finding that it is 'necessary to the safe and efficient operation of the business.' *Robinson* v. *Lorillard Corporation* (4th Cir. 1971), 444 F.2d 791, 798, cert. dis. 404 U.S. 1006. The defendant makes no claim for relief under this exception. Its denial of pregnancy-related disability from the application of its employee disability benefit program, in our opinion, falls clearly within the prohibitions of Title VII and *Aiello* confers no immunity for such denial." (Emphasis the court's).

GE (Supp. Br. fn. 4) in effect concedes that *Washington* v. *Davis* establishes that GE's original brief erred (pp. 18-19, 26-34) in asserting identity of constitutional and Title VII standards to support its contention that this case is controlled by *Geduldig* v. *Aiello,* 417 U.S. 484 (1974). GE nevertheless insists that for a variety of other reasons *Geduldig* v. *Aiello* is still controlling. There is no merit to its argument.

A. Title VII prohibits any classification in employment which "tends to deprive", or "adversely affect", an employee because of sex. Such statutory language encompasses the effects of GE's exclusion of pregnancy benefits. This statutory requirement makes Washington v. Davis controlling here, rather than Geduldig v. Aiello, which did not even mention Title VII.

The reach of Title VII has been clarified by the dichotomy between "purposeful" discrimination and "disparate impact" which *Washington* v. *Davis* defined. Title VII interdicts all employer practices on the basis of their effect. This Court held in *Washington* v. *Davis* (96 S.Ct. at 2051) that proving adverse effects of an employment practice on "substantially disproportionate numbers" of a disadvantaged class will establish a violation of Title VII, even though the practice is "rational" or "neutral". Such a practice can be defended under Title VII only by proving that it is a "business necessity."

Title VII's inclusive language, in Section 703(a), read in the context of an effects test, emphasized by *Washington* v. *Davis,* prohibits the conduct which causes the effects of GE's pregnancy exclusion upon GE's female employees. The language of Title VII is not limited to discrimination. While Section 703(a)(1) makes it unlawful to impose "discrimination * * * with respect to * * * compensation, terms, conditions or privileges of employment, because of * * * sex," Section 703(a)(2) does not use the word "discriminate" or "discrimination". Its reach is broader. An employer may not "*limit,* segregate or classify * * * *in any way* which would deprive or *tend* to deprive * * * or otherwise adversely affect * * * because of * * * sex" (Emphasis supplied).

Washington v. *Davis* demonstrates that this Court has never regarded the constitutional equal protection guarantee, even as applied under the "strict scrutiny" test in racial discrimination cases, as invalidating any non-purposeful disparate effect which is within the broad reach of Section 703(a)(2). Read in the clarifying light of *Washington* v. *Davis,* it is apparent that *Geduldig* v. *Aiello* did not negative a statutory construction of Title VII which prohibits the pregnancy exclusion because of its disparate effect upon compensation, terms and conditions of employment. Indeed, it bears repetition to point out that the Court's opinion in *Geduldig* v. *Aiello* did not even mention Title VII, but simply held that the Equal Protection Clause did not invalidate California's pregnancy exclusion in its disability insurance law.

The many ways in which GE's disability plan adversely affects females, as compared with males, shows that the pregnancy exclusion has a disparate impact within the ordinary and plain meaning of Section 703(a). The exclusion adversely affects GE female employees in the following ways:

1. Viewing disability benefits as compensation—as the court below (Supp. Br. Jt. Pet. 3a-4a) notes that GE regarded it (II App. 976)—and assuming that the female performs equal work at equal hourly wage rates, the exclusion means that she gets less compensation.[6] That is because the male GE employee receives not only his hourly wages, but also income protection

[6] *Hutchison* v. *Lake Oswego School District No. 7,* 519 F.2d 961, 565 (9th Cir. 1975), petition for cert. pending, No. 75-568); *Polston* v. *Metropolitan Life Ins. Co.,* 11 FEP Cases 380, 383 (U.S.D.C. Ky. 1975).

against any disability condition. A female must spend her own money to buy a personal disability policy covering pregnancy disability if she wants to be fully insured against a period of disability without income, whereas a male without extra expenditure is fully insured by GE against every period of disability. One court characterized these effects on women as follows:[7]

> "The practice of excluding pregnancy-related disabilities from the disability insurance income plan denies women the opportunity to enter the job market free from subjection to disparate treatment on account of their sex."

2. The female GE employee is under economic pressure to hide her disability and continue to work even if hemorrhaging, nauseated, or otherwise in a condition in which she should not work, whereas a male is never under such economic pressure.[8]

3. Conversely, a female GE employee who is able and desirous to work may be sent home without pay,

[7] *Appleton Papers Division of National Cash Register Co.,* 11 EPD ¶ 10, 608 (Wis. Cir. Ct., Dane City, 1975).

[8] Illustrative is the following answer which was given by Arlene Avery, a complainant in a case before the New York State Division of Human Rights, when asked on cross examination as to why she regarded the denial of disability benefits for a pregnancy-related disability as discrimination because of sex.

> "This girl I worked with, her husband worked in the foundry. They both were drinking quite a bit. She cut him, threw a knife at him, cut his arm with a knife. He was out of work I don't know how long and he collected sick pay for this because they got in a fight at home over drinking, but here I had a legitimate thing, I was bleeding, I couldn't work and I couldn't collect my sick pay."

Transcript of hearing held June 6, 1963 in *Avery* v. *General Railway Signal Corp.,* N.Y. State Division of Human Rights, Complaint Case No. CS-27503-72, p. 81.

and denied the related disability pay, but this is not done to men.

4. A female may be, in fact, disabled and should not be working, and the company doctor may be medically correct in disqualifying her. Yet, if she has no savings, and no other source of income to get money for food, rent, or utilities, she must either go on relief or get other employment in order to eat. In many such cases she is forced to work for employers whose pay rates are so low as to attract only those unable to secure other jobs, and who require such necessitous individuals to promise they will terminate prior job attachments. These events interrupt the continuity of a woman's work life and constitute a permanent handicap in a market where seniority or continuous work record is of great importance to higher pay and advancement.[9] The denial of disability benefits for pregnancy-related disabilities thus imposes on the female employee an economic disadvantage which is not imposed on any male GE employee when disabled.

5. Any male GE employee is free to embark on any course of conduct involving either voluntary or involuntary disability, assured that 60 per cent of his compensation will be maintained for 26 weeks and that if he has not then recovered, he will receive income maintenance as long as needed, until age 65, under GE's long term disability program and then can retire on a pension (II App. 537, see Gilbert original brief, pp. 13, 19).

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[9] "92 percent of the firms stated in interviews that continuous work experience was a prime determinant of employment." Dwight F. Flanders and Peggy Engelhardt Anderson, Sex Discrimination in Employment: Theory and Practice, Industrial and Labor Relations Review, vol. 26, No. 3, April 1973, p. 938, at p. 951.

These disability payments are made to all GE male employees, whether the cause of the disability occurred while he was on vacation, or had a voluntary operation, such as a hair transplant or nose job, or inflicted the injury on himself, or engaged in an aggressive fight, or even a crime, or was drunk, or was on strike against the Company, or any other event, of any nature. Indeed, no GE disabled male employee has ever been denied disability compensation because of the nature of the cause of disability. (Gilbert original brief, pp. 15-16).

6. Women are denied protection for their families against income loss when they are temporarily disabled. Like Stephen Wiesenfeld,[10] the female plaintiffs are denied the same protection for their families that a male GE worker would receive for his family.[11]

GE asserts that its female employees must suffer these disadvantages because it would be costly to provide them disability benefits for pregnancy-related disabilities. While the courts have uniformly held that cost is not a defense (see Gilbert original brief p. 143), GE spends more for procreation by its male employees. A male GE employee can enter upon procreation, assured that GE will pay all the hospital and doctor bills, not only for himself, but also for his wife. It should be noted that male employees have many more children than do female employees. Their procreation costs, computed by the sex averaging method which we believe is illegal but which is at the core of GE's presentation to this Court (see pp.

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[10] *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975).

[11] Comment: The impact of *Geduldig* v. *Aiello* on the EEOC Guidelines on Sex Discrimination, 50 Indiana Law Journal, 592, 605 (1975).

36-43, *infra*) is much more per male employee than per female employee. Thus, GE could pay disability benefits, plus hospital and medical expenses, for all pregnant female employees, at a female per capita cost for pregnancy-related benefits that is no greater than the male per capita cost for procreation activities (see pp. 57-59, *infra*).

B. The bona fide occupational qualification exception is so narrowly limited as to have no application to the dichotomy between constitutional standards and statutory standards.

GE (Supp. Br. pp. 15-16) argues that *Washington* v. *Davis* does not govern because of the bona fide occupational qualification exception contained in Section 703(e)(1), which provides:

> "* * * it shall not be an unlawful employment practice for an employer to hire and employ employees * * * on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Though Title VII itself does not spell out "those certain instances" where differences in treatment based upon sex are beyond the reach of the prohibitions contained in Section 703(a), the legislative history of the statute, as well as the Commission's interpretative guidelines and decisions, demonstrate that Section 703(a)(1) is to receive a narrow construction. During the debate in the Senate on the bill which became the Civil Rights Act of 1964, Senators Clark and Case,

the floor managers of the bill, introduced into the Congressional Record an interpretative memorandum which contained the following (110 Cong. Rec. 7213, Col. 1, April 8, 1964):

> "* * * *but section 704* [renumbered as Section 703 prior to final passage] *creates certain limited* exceptions from these prohibitions [of Section 703(a)]. First, it would not be an unlawful employment practice to hire or employ employees of a particular * * * sex * * * in those situations where * * * sex * * * is a bona fide occupational qualification for the job. This exception must not be confused with the right which all employers would have to hire and fire on the basis of general qualifications for the job, such as skill or intelligence. *This exception is a limited right* to discriminate on the basis of * * * sex * * * where the reason for the discrimination is a bona fide occupational qualification. (Emphasis supplied).

Senator Clark also inserted in the Congressional Record (110 Cong. Rec. 7216-7218) a memorandum answering questions propounded by Senator Dirkson. One of these questions and answers contained the following explanation of the BFOQ exception (110 Cong. Rec. 7217, col. 2, April 8, 1964):

> "Question. Section 704 [renumbered as Section 703 prior to final passage] describes the employment practices which are made unlawful by this bill. Subsection (e) of that section provides certain exceptions—namely: 'where religion, sex, or national origin is a bona fide occupation qualification reasonably necessary to the normal operation of that particular business or enterprise' or where a religious educational institution wishes to hire only employees of its particular religion. But

what of other reasonable occupational qualifications? The Harlem Globe Trotters may well wish to preserve their racial identity. A movie company making an extravaganza on Africa may well decide to have hundreds of extras of a particular race or color to make the movie as authentic as possible. A religious institution which operates a hospital may have as great a desire to employ people of its own religious persuasion in the hospital as it would in its educational institution.

"Answer. Although there is no exemption in Title VII for occupations in which race might be deemed a bona fide job qualification, a director of a play or movie who wished to cast an actor in the role of a Negro, could specify that he wished to hire someone with the physical appearance of a Negro —but such a person might actually be a non-Negro. Therefore, the act would not limit the director's freedom of choice."

This intent, expressed to the Senate by the floor managers of the bill, must control interpretation of the bona fide occupational qualification, because the Senate thereafter adopted the bill with this exception in the form described in the *Clark-Case* interpretative memorandum.

The narrow scope of § 704(e), as contained in the original House Bill[12] was also emphasized by the Report of the House Judiciary Committee:

> "*Section 704(e) provides for a very limited exception to the provisions of the title.* Notwithstanding any other provisions, it shall not be an unlawful employment practice for an employer to employ persons of a particular religion or national origin in *those rare situations* where religion or national origin is a bona fide occupational qualification." H.R. Rep. No. 914, 88th Cong., 1st Sess. p.27, (1963). (Emphasis supplied).

[12] Section 704(e) of that bill, with the addition of the word "sex", is identical with § 703(e)(1) of the Title as it was ultimately enacted.

Finally, the Commission through its interpretative guidelines, has viewed § 703(e)(1) as creating only a very narrow exception. Thus, the Commission has stated that it "* * * believes that the bona fide occupational exception as to sex should be interpreted narrowly." 29 C.F.R. § 1604.2(a). In this connection, the Commission has specifically noted that the application of the BFOQ exception will not be warranted in a situation where a refusal to hire a female is "* * * based on assumptions of the comparative employment characteristics of women in general", or where an individual is refused employment "* * * based on sterotyped characterizations of the sexes." The underlying rationale of these rulings is that, "The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group." 29 C.F.R. § 1604.2(a)(ii).

The Commission has also pointed out, "* * * that sex as a bona fide occupational qualification must be justified in terms of the peculiar requirements of the particular job and not on the basis of a general principle * * *" 29 C.F.R. § 1604.3(b).

The only specific illustration offered in the guidelines, is that "Where it is necessary for the purpose of authenticity or genuineness, the Commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress." (29 CFR 1604.2(a)(2).

The bona fide occupational qualification does not serve to provide any statutory distinction between the sex prohibition and the race prohibition. The need for authenticity with respect to a black actor would dictate the same result in the case of race as of sex, as was noted on the floor of Congress (see pp. 15-16, *supra*).

If there is any distinction, it relates only to the hiring or selection of a person for a job. It has no application to the mandate for equality between males and females, blacks and whites, with respect to compensation, terms or conditions of employment or with respect to classifications adversely affecting an individual because of race or sex.

GE cites no cases arising under the BFOQ exception, and we know of none, which would indicate that the BFOQ exception is basis for any difference in the application of Title VII because the distinctions challenged are of gender rather than race.

C. Sex, as a forbidden basis for disparate treatment under Title VII, stands in the same position as race and hence the statutory standard under Title VII is controlling here.

The language of Title VII, its legislative history, and the uniform holdings thereunder establish that there is no difference in the statutory standards applicable to cases arising in the sex context than are applicable in the race context. Everywhere the word race appears in Title VII, the word sex also appears. The reverse, languagewise, occurs only twice: first, with respect to the bona fide occupational qualification, which, as discussed above (pp. 14-18, *supra*), is narrow in intent and as a practical matter differs in no respect from the "business necessity" to have black actors play certain black roles in the interest of authenticity;

second, in Section 703(h), which authorizes discrimination in wages between males and females "if such differentiation is authorized" by the Equal Pay Act, 29 U.S.C. 206(d). Neither of these exceptions applies here. Aside from these two minor differences, Title VII defines discrimination because of race and sex identically. The legislative history of Title VII shows that Congress intended that Title VII have the same broad reach when sex is at issue as when the case presents an issue of race. The legislative history of the 1972 amendments to Title VII shows that Congress repeatedly emphasized the same concern over discrimination because of race and discrimination because of sex. Both the House and the Senate Reports stated: [13]

> "Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.'

The courts have uniformly held that discrimination because of sex is as reprehensible as discrimination because of race and that Title VII applies equally to both.[14]

To the extent that there is a difference between race and sex discrimination in the dichotomy between constitutional standards and statutory standards, the difference is not because statutory standards of Title VII applicable to sex are any different from the statutory standards of Title VII applicable to race.

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[13] H.R. Rep. No. 92-238, 92d Cong., 1st Sess., 5 (1971); S.Rep. No. 92-415, 92d Cong., 1st Sess., 7-8 (1971).

[14] E.g., *Local 186, Int'l Union of Pulp, etc. Workers* v. *Minnesonta Mining & Mfg Co.*, 304 F.Supp. 1284, 1 FEP Cases 764, 767 (S.D. Ind. 1969).

The difference is on the side of the constitutional standards. Since this Court has never subjected sex discrimination to the "strict scrutiny" standard applicable to race,[15] state action which discriminates between the sexes [16] may survive constitutional challenge when state action which discriminates between the races [17] may not.

The absence of the "strict scrutiny" in the constitutional standard for sex discrimination, however, does not afford the slightest basis for applying a different construction to Title VII when the issue involves sex discrimination than when it involves race discrimination. Instead of making the Title VII and equal protection standards similar, the absence of strict scrutiny in respect to sex means that the "reasonableness" test, which is applied to even purposeful sex discrimination when considering a constitutional equal protection challenge, is not applied when considering the Title VII challenge. However the "reasonableness" test is not applied to purposeful race discrimination when considering the challenges under the equal protection clause or Title VII.

The statutory Title VII standard, enunciated in *Washington* v. *Davis,* that a reasonable purpose will not suffice to sustain discrimination under Title VII, is thus fully applicable here.

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[15] *Frontiero* v. *Richardson,* 411 U.S. 677 (1973); *Reed* v. *Reed,* 404 U.S. 71 (1971); *Kahn* v. *Shevin,* 416 U.S. 351 (1974).

[16] *Kahn* v *.Shevin,* 416 U.S. 351 (1974).

[17] *Korematsu* v. *United States,* 323 U.S. 214, 216 (1944).

D. Degrees of discrimination because of sex with respect to fringe benefits are not permitted by Title VII. Thus, the controlling effect of Washington v. Davis is not lessened simply because this case involves fringe benefits instead of hiring.

GE contends (Supp. Br. p. 10-15) that *Washington* v. *Davis* is not applicable because it involved discrimination in hiring, whereas this case involves discrimination in benefits. This contention rests on the unfounded assumption that degrees of discrimination as to benefits are permissible. This assumption flies in the face of the statutory language, the uniform decisions of the courts and logic. As the Fifth Circuit stated: [18]

> "The degree of discrimination practiced by an employer is unimportant in Title VII. Discriminations come in all sizes and all such discriminations are prohibited by the Act."

In a wide variety of fringe benefit cases the courts have held employers to the same strict adherence to nondiscrimination as is applicable to hiring. [19]

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[18] *Rowe* v. *General Motors Corp.,* 457 F.2d 348, 354 (5th Cir. 1973).

[19] *Rosen* v. *Public Service Electric & Gas Co.,* 409 F.2d 775 (3d Cir. 1969), 477 F.2d 90 (3d Cir. 1973), 11 FEP Cases 330 (USDCDNJ 1974); *Bartmess* v. *Drewrys, USA, Inc.,* 444 F.2d 1186 (7th Cir. 1971), cert. den. 404 U.S. 934; *Chastang* v. *Flynn & Emrich Co.,* 365 F.Supp. 957, 6 FEP Cases 357, 364 (USDC Md. 1973); *Ugiansky* v. *Flynn and Emrich Co.,* 337 F.Supp. 867, 870, 4 FEP Cases 336, 337 (D. Md. 1972); *Mixon* v. *Southern Bell T&T,* 324 F.Supp. 525, 4 FEP Cases 27 (N.D. Ga. 1971); *Fillinger* v. *East Ohio Gas Co.,* 4 FEP Cases 73 (USDCND Ohio 1971); *Fitzpatrick* v. *Bitzer,* 390 F. Supp. 278, 8 FEP Cases 877, 8 EPD ¶ 9685 (D.Conn. 1974), aff'd 419 F.2d 559 (2d Cir. 1975), revd. on Eleventh Amendment, 96 S.Ct. 2666; *American Finance System* v. *Pickrel,* 8 FEP Cases 1054, 7 EPD ¶ 9141, ¶ 9081 (USDCD Md. 1974); *American Fi-*

II.

If Washington v. Davis is not conclusive as to the inapplicability of Geduldig v. Aiello, the differences between the issues there presented and those here involved make Geduldig v. Aiello inapplicable.

GE's main attack on the applicability of *Washington* v. *Davis* is premised on footnote 20 of *Geduldig* v. *Aiello* in which this Court stated that not "every legislative classification concerning pregnancy is a sex-based classification." This Court did not state that no classification concerning pregnancy was sex-based. The district court found that GE's exclusion of pregnancy was sex-based (Jt. Pet. 30a-33a, 37a). The exclusion was found to be neither "neutral on its face" nor "in its intent" (Jt. Pet. 63).

In view of the variety of disparate effects which the pregnancy exclusion has on women (see pp. 10-13, *supra*), and without reliance on the finding of discriminatory motivation (see Gilbert original brief, pp. 86-100), we believe this finding was correct. *Geduldig* v. *Aiello* was not concerned with the effect of an employer's exclusion on the employment relationships in its plant. Nor did *Geduldig* involve the application of a statute enacted by Congress under the Commerce Clause to reach all practices which might interrupt or impede commerce.

The courts have applied several different analyses in reaching the conclusion that the many disparate effects of excluding pregnancy-related disabilities from an otherwise all inclusive disability program came within

nance System v. *Harlow* (USDC Md. 1974); *Henderson* v. *Oregon*, 11 FEP Cases 1218, 10 EPD ¶ 10,583 (D. Ore. 1975); *Manhart* v. *Los Angeles*, 387 F.Supp. 980 (C.D. Calif. 1975); *Rogers* v. *Equal Employment Opportunity Commission*, 454 F.2d 234 (5th Cir.).

the prohibitions of Title VII. Four different theories, none mutually exclusive and two, three, or all of which are often adopted by the same court in the same opinion, appear from the opinions:

1. The exclusion constitutes discrimination in compensation because of sex;[20]

2. The exclusion constitutes discrimination in privileges of employment because of sex;[21]

3. Since pregnancy is sex-linked, any different treatment because of pregnancy is discrimination because of sex;[22]

4. The pregnancy exclusion, even if viewed as a neutral practice without purposeful discrimination has a disparate discriminatory impact on female employees because of sex.[23] So viewed, and applying the teaching

[20] See the Court of Appeals in the instant case (Supp. Br., Jt. Pet. 3a-4a); *Payne* v. *Travenal Laboratories, Inc.*, 12 FEP Cases 770, 783 (U.S.D.C.N.D. Mass. 1976); *Zichy* v. *City of Philadelphia*, 392 F.Supp. 339, 10 FEP Cases 853 (E.D. Pa. 1975).

[21] *Ray-O-Vac Divison of ESB* v. *Wisconsin Dept. of Industry, etc.*, 236 N.W. 2d 209, 12 FEP Cases 64 (Wis. Sup. Ct. 1975):

> "Pregnancy is undeniably a sex-related characteristic and whatever Ray-O-Vac's good motives, the effect of the plan is to discriminate against women employees, all of whom presumably have the capacity to become pregnant."

[22] The district court in this case (Jt. Pet. 29a, 37a); *Polston* v. *Metropolitan Life Ins. Co.* 11 FEP Cases 380, 383 (U.S.D.C. W.D.Ky. 1975); *Appleton Papers Division of National Cash Register* v. *Wisconsin Dept. of Labor, etc.*, 11 EPD ¶ 10,608 (Wis. State Circuit Court, Dane Cty., 1975).

[23] "Even if neutral on its face, such policy treats a protected class in a disparate manner and this is precisely what Title VII intends to strike down", *Wetzel* v. *Liberty Mutual*, 511 F.2d 199 (3d Cir. 1975), vacated 96 S.Ct. 1202 (1976; *Hutchinson* v. *Lake Oswego School District No. 7*, 519 F.2d 961, 965 (9th Cir. 1975), pet. for cert. pending No. 75-568; *Guse* v. *J.C. Penney Co., Inc.*, 11 EPD ¶ 10,626 (D.C. Wis. 1976); *Zichy* v. *City of Phila.*, 392 F. Supp. 397, 10 FEP Cases 853 (U.S.D.C.E.D.Pa. 1975); *Ray-O-Vac*

of *Washington* v. *Davis*, footnote 20 in *Geduldig* v. *Aiello* is entirely consistent with the decision below. Because the pregnancy exclusion in Geduldig lacked a discriminatory purpose and thus was considered as a sex neutral practice, it was not subject to constitutional challenge. But under Davis, its disparate impact on female employees would trigger the Title VII prohibition.

We believe the courts below correctly determined that the exclusion was sex-based (Jt. Pet. 30a-33a, 37a, Supp. Br., Jt. Pet. 4a). But even of it is considered as a sex-neutral exclusion, its disproportionate impact on women brings it within the standards of Title VII as enunciated in *Washington* v. *Davis* and renders *Geduldig* v. *Aiello* inapplicable.

III.

Congress has enacted several statutes which indicate its view that the denial of benefits for pregnancy-related disabilities is discrimination because of sex.

A. Railroad Unemployment Insurance Act

The first consideration by Congress of the payment of disability benefits during absences for pregnancy-

Divison of ESB v. *Wisconsin Dept. of Industry, etc.*, 236 N.W. 2d 209, 12 FEP Cases 64, 68 (Wis. Sup. Ct. 1975). "The relevant question here is whether in the light of the purposes, the effect of the benefits program is to provide disparate treatment for men and women employees"; *Zichy* v. *City of Phila.*, 392 F.Supp. 339, 10 FEP Cases 853, 857 (E.D. Pa. 1975), ("impact alone establishes liability"). The district court in the instant case found the exclusion was neither "neutral on its face" nor "in its intent" (Jt. Pet. 30a) and also constituted "disparate treatment of persons, otherwise similarly situated, on the basis of a peculiar condition, the peculiarity of which is irrelevant to the purpose" (Jt. Pet. 37a).

related disabilities which we can find occurred in 1945 in connection with the amendment of the Railroad Unemployment Insurance Act[24] to provide income maintenance for railroad employees during all temporary disabilities, including those pregnancy-related. During the hearings the chairman of the House Committee on Interstate and Foreign Commerce, who was conducting the hearings, pointed out that a precedent already existed in the practice of the United States Government to make available sick leave and annual leave during absences for pregnancy.[25]

The bill presented to and adopted by Congress was drafted by the railway labor organizations and as pro-

[24] The present version of the pertinent portions of the Railroad Unemployment Insurance Act is found in 45 USC 351(b)(2), and provides that "'a day of sickness' with respect to any employee, means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness or disease he is not able to work, or, with respect to a female employee, a calendar day on which, because of pregnancy, miscarriage or the birth of a child, (i) she is unable to work or (ii) working would be injurious to her health, and with respect to which (i) no remuneration is payable or accrues to her." The first version as enacted July 31, 1946 is found in 60 Stat. 736, U.S. Code Cong. Ser. 1946, p. 702. The pertinent sections read: "Sec. 302. Subsection 1(j) is amended by substituting for the period at the end thereof a comma and adding 'maternity insurance, a sickness insurance'. Sec. 303. The first paragraph of subsection 1(k) is amended by inserting '(1)' after the phrase 'section 4 of this Act' and by substituting for the colon before the phrase "Provided, however, the following: 'and (2)a 'day of sickness' with respect to any employee, means a calendar day on which because of any physical, mental, psychological, or nervous injury, illness, sickness or disease he is not able to work or which is included in a maternity period."

[25] Hearings before the Committee on Interstate and Foreign Commerce, House, 79th Cong., 1st Sess., on H.R. 1362, p. 286 on February 2, 1945.

posed included coverage of disabilities due to pregnancy.[26] In including coverage of disabilities due to pregnancy the railway labor organizations were following the practice of unions in Europe. There the workers' organizations in establishing insurance to provide income maintenance during disabilities had made the same provision for disabilities due to childbirth and complications of pregnancy as for any other disability with only one exception, namely, providing mandatory benefits for three or four weeks for childbirth, but the same maximum benefits if the female was disabled for a longer period.[27]

Lester P. Schoene, who appeared before the Congressional Committee on behalf of the Railway Labor Executives Association and presented their proposal for the disability insurance amendment, in explaining

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[26] Hearings, op. cit. p. 38.

[27] Henry J. Harris, Workmen's Insurance in Austria, reprinted from the 24th Annual Report of the U.S. Commissioner of Labor, Washington, D. C. (Library of Congress Call Number HD7171.M3) pp. 251, 253, setting forth a model constitution for a sick fund which provided in Article II, Section 3: "3. • • • In cases of normal childbirth, the sick benefits shall be continued for four weeks; if the case continues longer, then benefits shall be paid each to the maximum above specified [20 weeks]". In Germany the codification in 1883 of rules for workers' insurance funds which followed the accepted practices established by the workers over the preceding years contained the following provision for benefits for pregnancy-related disabilities.

§ 20. The local sickness fund must grant at least

• • •

2. An equal benefit to a person with child for a period of at least three weeks after she has given birth.

Law concerning sickness insurance for workers, June 15, 1883, No. 1496, published in Reichs-Gesetzblatt 1883, No. 9, p. 73.

its provisions for the payment of benefits during maternity absences, testified as follows:[28]

> "You cannot solve the problems which maternity illness produces by merely deciding not to include them in your sickness-benefit scheme. When we were drafting these proposals we had to address ourselves to some very specific concrete problems that arise in the administration of sickness benefits. You have got to decide in the first place whether you are going to pay benefits for sickness due to maternity or whether you are not going to pay them, and if you are not going to pay them, you have to make provision for not paying them. If you make provision for not paying them, you have to set up procedures by which you will assure that you are not going to pay what you have decided not to pay.
>
> "In other words, a female employee is ill. She may or may not be pregnant. If you have decided that you are not going to pay for illness due to maternity, or pregnancy, then you have got to make sure that whenever a female employee is ill, that that illness is not due to pregnancy. So, you first have to find out whether she is pregnant, and if you find that she is pregnant, you have got to make further decisions. Are you going to bar from sickness benefits every female employee who is pregnant, or are you going to try to distinguish between these illnesses occurring during that period that are due to pregnancy and those that result from other causes? We looked over all of these problems, and we just could not face the notion of having the Railroad Retirement Board administering sickness-insurance benefits and requiring information from every ill female employee as to whether or not she was pregnant and if she was pregnant whether or not the illness was

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[28] Hearings, *op. cit.*, pp. 1112-1113. See also, pp. 38, 76-78.

due to pregnancy. That would require a great deal of administrative folderol, and when you get all through with it, what have you accomplished? You have accomplished the exclusion from payment of something which by all reasonable human standards ought to be paid anyway.

* * *

"* * * Beyond that there are matters relating to continuing the relationship of employer and employee; as a matter of fact, a great many employers, including the Federal Government, will grant leave with pay to provide for these conditions, so that the individual maintains an employee association with the employer and will return to employment when the condition permits. We say that there is ample justification on industrial grounds and on human grounds for the inclusion in this system of sickness benefits of this special feature dealing with maternity cases."

Murray W. Latimer, Chairman of the Railroad Retirement Board, testifying in support of the bill, pointed out that the purpose of coverage of pregnancy-related disabilities was the same as the purpose of paying benefits for other disabilities. One of the purposes, applicable to all income maintenance during absence from disability, but of particular importance to pregnant women, was the economic pressure they would be under to work longer than they should and return sooner than they should, and thereby injure their health.[29]

In considering the inclusion of pregnancy-related disabilities, Congress had before it figures[30] on the estimated costs, including probable number of births,

[29] Hearings, pp. 76-78.

[30] Hearings, pp. 123-127, 31-132.

and also figures on the relative number of days of disability of males compared with females, as well as of black employees as compared with white. The rate of disabling illness of 8 days or more in 1942 was 122.1 per thousand for white males, 189.3 per thousand for females, and 244.9 per thousand for Negroes.[31] The tables which Congress had before it with respect to the differences in disability between the sexes and the races showed the following:

TABLE 51.—*Estimated annual number of disabling illnesses of 8 days or more 1943-1944 for white men with railroad earnings of $150 or more in 1942*

Age Group	Percent	Frequency Rate Per Thousand
Total	99.7	122.1
Under 25	20.5	97.5
25 to 34	20.7	105.0
35 to 44	21.0	116.5
45 to 54	21.2	129.3
55 to 64	13.6	156.7
65 +	2.7	168.8

TABLE 52.—*Estimated annual number of disabling illnesses of 8 days or more 1943-1944 for Negro men with railroad earnings of $150 or more in 1942*

Age Group	Percent	Frequency Rate Per Thousand
Total	99.3	244.9
Under 25	21.5	227.2
25 to 34	30.4	269.8
35 to 44	25.0	243.5
45 to 54	15.0	239.2
55 to 64	6.4	206.8
65 +	1.0	226.2

[31] Hearings, pp. 114-116.

TABLE 54.—*Number of nonindustrial disabilities and of days of disability per 1,000 per year, by sex*

Duration (days)	Average duration (days)	Number per 1,000 women				Number per 1,000 men			
		Nonindustrial disabilities		Days of disability		Nonindustrial disabilities		Days of disability	
		Number [1]	Cumulated	In interval	In sub-group	Number [1]	Cumulated	In interval	In sub-group
All durations	1	1,846.7	.....	11,275.9	.....	897.3	.....	7,047.5	.....
1	.....	608.1	1,846.7	608.1		220.1	897.3	220.1	
2	2	331.3	1,238.6	662.6		132.2	677.2	264.4	
3	2	287.0	907.3	861.0		145.8	545.0	437.4	
4	3	141.1	620.3	564.4	4,232.8	84.4	399.2	337.6	2,300.0
5	4	101.6	479.2	508.0		60.0	314.8	300.0	
6	6	80.6	377.6	484.8		54.7	254.8	328.2	
7	7	77.7	296.8	543.9		58.9	200.1	412.3	
8 to 14	10.88	100.0	219.1	1,088.0	7,043.1	62.3	141.2	677.8	4,747.5
15 to 28	20.27	45.9	119.1	930.4		30.9	78.9	626.3	
29 to 49	37.60	35.8	73.2	1,346.1		21.5	48.0	808.4	
50 to 98	69.70	24.0	37.4	1,672.8		17.5	26.5	1,219.8	
99 to 189	132.96	9.4	13.4	1,249.8		5.1	9.0	678.1	
190 and over [2] ...	189.00	4.0	4.0	756.0		3.9	3.9	737.1	

[1] Based on study of U. S. Public Health Service, Division of Industrial Hygiene, Absenteeism, from Manual of Industrial Hygiene and Medical Services in War Industries, by Dr. Wiliam M. Gafafer, table 2.

[2] The maximum number of days of sickness in compensable registration periods.

The manner in which the average disability rate of women was figured from the foregoing table was explained as follows:[32]

> "The number of cases of illnesses of 8 days or more was estimated on the basis of the number of cases per 1,000 women in relation to the number of cases per 1,000 men for cases of 8 days or more experienced by employees of the public utility (table 54). The number of cases per 1,000 women workers was found to be 1.55 times as high as for each 1,000 men workers (219.1 as compared with 141.2). This differential was applied to the number of illnesses of like duration per 1,000 men multiplied by the number of thousands of women qualified for benefits. It was assumed that the qualified women were white (only about 4 percent of the women were Negro, one-fifth or one-sixth of 1 percent of all qualified workers). The rate of illnesses of 8 days or more for white males (table 51) was 122.1. The rate for women would be, therefore, 55 percent more, 189.3"

Congress adopted a railway disability plan which covered all disabilities and provided equal benefits at equal cost for blacks as compared with whites, and for females as compared with males. Pregnancy-related disabilities were included as a covered disability.

B. Equal Pay Act legislative history

The contention of industry that it created an imbalance in favor of women to pay both disability benefits for pregnancy plus equal wages was twice rejected by Congress in the course of its enactment of the Equal Pay Act, 29 U.S.C. § 206(d). In hearings preceding enactment of the Equal Pay Act, there was considerable testimony by representatives of industry as to the costs to industry of disability benefits during preg-

[32] Hearings, p. 116.

nancy. They said it would be unfair to require equal pay without permitting a deduction for the extra costs involved in employing women, including the cost of covering disability benefits (see Gilbert original brief, pp. 51-54, 123-128). In supporting the Martin bill, H.R. 1936, 88th Cong. (quoted in pertinent part in Gilbert original brief, p. 124, fn. 55), representatives of industry made repeated speeches about the high respect in which they held motherhood, but that its costs could not properly be imposed on industry. Illustrative is the testimony of John G. Wayman, who appeared on behalf of numerous employers whom he represented in his law practice and who has filed an amicus brief here in support of G.E. Mr. Wayman testified:[33]

> "The [Martin] bill contains an exception called Payments Attributable to Ascertainable and Specific Added Cost Resulting From Employment of Opposite Sex * * * . The fact is, again coming back to the undeniable fact of life, women are different than men. They pose different problems in industry. They have a tendency, thank goodness, to get married and have children."

Arguing on the floor of Congress in support of the Finley Amendment, 109 Cong. Rec. 9206, (quoted in Gilbert original brief, p. 124, fn. 55) which similarly would have had the effect of permitting employers to deduct from wages the otherwise equal amounts paid for the extra costs of employing women, including premiums for disability benefits for pregnancy-related disabilities, Congressman Finley said (109 Cong. Rec. 9205):

> "Most of these extra costs arise from the indisputable fact that women are more prone to home-

[33] Hearings on H.R. 3861 and related bills before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess., March 25, 1963, p. 146.

> making and motherhood than men. No one of my acquaintance would for the world want to change this fact, but it is one that enters into personnel costs."

The failure of Congress to report out the Martin bill and the defeat on the floor of Congress of the Finley Amendment (109 Cong. Rec. 9217), establishes the Congressional understanding that paying women pregnancy-related disability benefits was not discrimination in favor of women, but rather necessary to insure equality.

C. Title VII legislative history—rejection of "solely" because of sex amendment

The legislative history of Title VII shows that Congress intended to cover situations in which sex is not the sole distinguishing factor between the relative positions of men and women. During the debates in 1964, Senator McClellan in the Senate (110 Cong. Rec. 1837) and Representative Dowdy in the House (110 Cong. Rec. 2728) each proposed an amendment which would have inserted the word "solely" before all the categories of discrimination proscribed by the Act. This amendment was defeated in the Senate by a roll call vote and in the House by a voice vote.[34] No effort was ever made to place the limitation of "solely" upon sex apart from the effort so to limit

[34] 110 Cong. Rec. 2728, 13837-13838 (1964). Senator Case responded to the proposed McClellan amendment by stating:

> "The difficulty with this amendment is that it would render Title VII totally nugatory . . . [T]his amendment would place upon persons attempting to prove a violation of this section, no matter how clear the violation was, an obstacle so great as to make the title completely worthless."

Id. at 13837.

discrimination as to all categories, including race, nationality, and religion as well as sex. Congress thus manifested its intent to prohibit "sex plus" equally with its prohibition of "race plus", "nationality plus" and religion "plus". This legislative history has been cited to hold that an employment practice is not beyond the reach of Title VII because it "adversely affects only a portion of the protected class" or is based on "physical properties possessed by one sex. *Sprogis* v. *United Airlines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971), *cert. denied,* 404 U.S. 991 (1971); *Polston* v. *Metropolitan Life Ins. Co.,* 11 FEP Cases 380, 387 (USDCWDKy, 1975).

D. Title VII legislative history—intent to prohibit discrimination against women because of physiology

The House Report on the bill which amended Title VII in 1972 stated.[35]

> "Despite the efforts of the courts and the Commission discrimination against women continues to be widespread, and is regarded by many as either morally or *physiologically* justifiable." (Emphasis supplied)

This concern over the continued discrimination against women because of their physiology was relied upon by Congress in its enactment of the 1972 amendments.

E. Equal Rights Amendment legislative history

Congress rejected by a roll call vote the amendment offered by Senator Erwin to exclude from the prohibi-

[35] H.R. Rep. No. 92-238, 92nd Cong., 1st Sess. 5 (1971) It is noted further that Congress had found many more complex aspects connected with sex discrimination than had been guessed before passage of the original Act. *Id.,* at 8.

tions of unequal treatment in the proposed Equal Rights Amendment "distinctions * * * based on physiological or fundamental differences between males and females." (118 Cong. Rec. 9537-9538). In the context of the debate in which opponents of the Equal Rights Amendment objected to its impact upon certain laws respecting maternity and supporters viewed this effect as desirable (Gilbert original brief, pp. 138-139), the rejection of the Erwin amendment takes on added meaning. And that added meaning is that Congress viewed discrimination because of sex as embracing discrimination because of pregnancy.

F. HEW Regulations on non-discrimination because of sex in education under Title IX

As set forth in our main brief (Gilbert original brief, pp. 129-130), Congressional intent here relevant is found in the approval of the Sex Discrimination Guidelines, 40 Fed. Reg. 241.44, 45 C.F.R. par. 86.57, by the Department of Health, Education and Welfare under Title IX of the Civil Rights Act of 1972, 86 Stat. 373, as amended, 20 U.S.C. (Supp. IV) 1681. The statutory authority under which the HEW Guidelines were issued provides in pertinent part that (20 U.S.C. (Supp II) 1681(a)):

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program activity receiving Federal financial assistance * * *."

The HEW Guidelines are the same as the EEOC Guidelines in all respects here material. Section

86.57(c) of the Regulations (40 Fed. Reg. 24144) adopted to implement this provision specifically states:

> "(c) *Pregnancy as temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment."

They were promulgated at the direction of Congress, see Title IX of the Education Amendments of 1972, 20 U.S.C. (Supp. II) 1681, and signed by the President. If the HEW guideline was in conflict with Congressional intent, Congress had the opportunity to so indicate by withholding its approval of the HEW guideline, for, in the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484, Congress required that any regulations implementing Title IX be submitted to both Houses for a review period of forty-five days prior to their implementation. The HEW guidelines were so submitted to Congress for approval. The pregnancy regulations were brought to the attention of the Senate by Senator Helms (121 Cong. Rec. S9714-9715 (daily ed. June 5, 1975)) and a resolution of disapproval was introduced by him, but no action was taken on the resolution.

This is further firm support for a holding that the EEOC guidelines represent the Congressional intent as to the applicability of Title VII to discrimination because of pregnancy.

IV.

It constitutes prohibited discrimination because of sex to deny pregnancy-related disability benefits on the ground that the average incidence and length of disability of a female employee, even without the inclusion of time lost due to pregnancy-related disabilities, exceeds that of a male employee.

GE asserts that sickness and accident benefits are utilized more frequently by women than by men under the existing GE disability benefit program. GE contends that it is therefore justified in denying pregnancy coverage because inclusion would increase the imbalance and unduly favor women.

A. The district court properly found that GE's evidence failed to establish that its average female employee received larger benefits from GE's existing benefit plan without pregnancy coverage than the average male

The district court found that GE relied upon the allegedly greater utilization by women as a reason for denying coverage to pregnancy related disabilities (Jt. App. 24a), but that GE had failed to prove that there was in fact greater utilization (Jt. App. 31a-32a). The district court stated (Jt. App. 31a-32a):

> "While it may * * * be theoretically argued that the adding of benefits for disabilities to which only women are subject, and which as a consequence increases their compensation, represents a discriminatory practice against men, such an argument must fail for the lack of evidentiary support."

Similarly the court stated (Jt. App. 31a):

> "[T]he Court gives no weight to the suggestion that the actuarial value of the coverage now pro-

vided is equalized as between men and women. Defenses must be bottomed on evidence, and such, in this regard, is lacking here."

In the same vein the court stated (Jt. App. 32a):

> "Simply stated it would have to be shown that absent pregnancy disability provisions, the effects of the balance of defendant's disability program were in fact equalized. Merely showing, as G.E. has, that in two previous years the coverage given women's per capita disabilities has cost somewhat more is insufficient especially in light of the myriad of factors which might have and undoubtedly did contribute to such a result."

GE's presentation to this Court of the New York State Department of Insurance Study, irrespective of how that study is evaluated (it contains much more comprehensive Social Security Department figures showing just the opposite of the figures compiled by New York with respect to incidence of disabilities between males and females, see Table 11), cannot properly serve to bolster up the evidential deficiencies of the record which GE made in the district court in this case. Figures as to the experience of insurance companies under individual disability benefit policies would not, even if introduced in the district court, have served as an adequate substitute for the evidence of GE experience over the years. And certainly such record supplementation cannot be made in this Court.

B. Even if unequal utilization occurred, application of sex averages to deny benefits constitutes a classification because of sex in violation of Section 703(a)(2) of Title VII

If it is assumed as a fact that either GE's female employees or women generally have a greater incidence of work disability than men, to deny women

disability benefits on this basis violates the fundamental principle of non-discrimination requiring individual rather than group treatment. The premise of GE's argument is that women would properly be entitled to disability benefits for time lost due to pregnancy disability if women as a group did not have more loss of time due to disability than men.

But any given woman who applies for disability benefits for a pregnancy related disability may never have had any other days of disability in a long work history. To hold that all men may recover disability for all disabilities because men as a group have fewer disabilities but to deny a woman pregnancy benefits on the basis that women as a group already have more days of disability than males is to prejudice that woman simply because she is a member of a group that has extensive disability.

Illustrations of the way in which GE's theory discriminates help clarify the principle involved. Mary Jones is pregnant and hemorrhaging. She continues to work because she cannot afford to have her only source of income, her pay check, cease. She feels weak and worries that continued work may endanger her life or that she may lose the baby which she is anxious to have. She has worked for GE for 10 years and personally has never had a day of disability previously. But on GE's theory she is not entitled to go home and draw disability benefits because other women had had large numbers of disability absences. John Smith who works next to her has drawn 26 weeks disability benefits a year for the past 10 years. He too begins to bleed. It is from an ulcer. He is free to stop work and go home assured of a continuance of 60 per cent of his wages.

The principle that the policy of nondiscrimination bars all use of sex averaging as a factor in awarding pay or fringe benefits was embodied by the Wage-Hour Administrator in his original Interpretation Bulletin 29 C.F.R. 800.151, Feb. 11, 1966, 31 FR 2657, issued under the Equal Pay Act, 29 USC 206(d). This Bulletin reads:

> "Section 800.151.
>
> Section 800.151.—Examples—employment cost factors.
>
> A wage differential based on claimed differences between the average cost of employing the employer's women workers as a group and the average cost of employing the men workers as a group does not qualify as a differential based on any "factor other than sex," and would result in a violation of the equal pay provisions, if the equal pay standard otherwise applies. To group employees solely on the basis of sex for purposes of comparison of costs necessarily rests on the assumption that the sex factor alone may justify the wage differential—an assumption plainly contrary to the terms and purpose of the Equal Pay Act. Wage differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed, because in any grouping by sex of the employees to which the cost data relates, the group cost experience is necessarily assessed against an individual of one sex without regard to whether it costs an employer more or less to employ such individual than a particular individual of the opposite sex under similar working conditions in jobs requiring equal skill, effort, and responsibility.

For a case applying this principle under the Equal Pay Act see *Wirtz* v. *Midwest Mfg. Co.,* 18 WH Cases 556 (U.S.D.C.S.D. Ill. 1968).

For an application of this principle to hold that an employer violated Title VII by paying females lower disability benefits than males because females had a greater incidence of disability see *Taylor* v. *Goodyear Tire & Rubber Co.,* 5 EPD ¶ 85451 USDCND Ala. 1972), quoted Gilbert brief p. 152.

The principle that sex averaging violates Title VII has likewise been applied to reject the defense of greater female longevity when advanced by an employer as a justification for paying females lower pensions than males, *Henderson* v. *State of Oregon,* 11 FEP Cases 1218 (D. Ore. 1975), and for charging females higher contributions than males for equal pension benefits. *Manhart* v. *City of Los Angeles,* 387 F. Supp. 980 (C.D. Calif. 1975) pending an appeal to the 9th Cir., Docket Nos. 75-2729, 75-2807 and 75-2905. The district court in Manhart stated the principle as follows (387 F. Supp. at 980):

> In passing Title VII, Congress established a policy that each person must be treated as an individual and not on the basis of characteristics generally and often falsely, attributed to any racial, religious, or sex group. In short, under the Equal Employment Opportunity Act of 1972, all stereotype treatment of persons based on race, religion, or sex whether rational or irrational is dead. Because the Department of Water and Power's practice in question here violates these considerations by applying the general actuarial characteristic of female longevity to individual female employees who in reality may or may not outlive individual male employees, the court concludes that plaintiffs have established a case of discrimination under § 703(a)(1) of the Equal Employment Opportunity Act.

The district court in *Manhart* quoted with approval from a Harvard Law Review Comment, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 64 Harv. L. Rev. 1199, 1174, as follows:

> "Title VII, in the field of employment, requires evaluation on an individual basis rather than a prediction made on the basis of a sex-defined group" * * *
>
> "Title VII focuses on presenting each employee in an individual light, free from conclusions that may be drawn from the individual's membership in one sex or the other."

In *Henderson* v. *State of Oregon, supra,* 11 FEP Cases at 1221, n. 5, the district court noted that 84 per cent of men and women die at the same age. Thus, although women as a class live longer, the substantial majority of men and women do die at the same age. Concepts as to what women generally do cannot, under Title VII, be used as a basis for treating all women as within that generality. As the Ninth Circuit recognized in *Rosenfeld* v. *Southern Pacific Co.,* 444 F.2d 1219, 1225 (9th Cir. 1971), Congress, in enacting Title VII, established the policy that "individuals must be judged as individuals and not on the basis of characteristics generally attributed to racial, religious, or sex groups."

The courts have consistently held that even though it may be generally true that women as a class ("on the average") are less strong than men as a class and therefore fewer women than men may be able to lift a given weight, individual women cannot be penalized by excluding all women from a particular job requiring such lifting. E.g., *Rosenfeld* v. *Southern Pacific Co., supra; Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d

711 (7th Cir. 1969). See also *Diaz* v. *Pan American World Airways, Inc.,* 442 F.2d 385, 388 (5th Cir.), *cert. denied,* 404 U.S. 950 (1971), where the court noted that the employer "cannot exclude *all* males [from the job of flight attendant] simply because *most* males may not perform adequately." (emphasis in original). So here the fact that women as a class may have more days of disability than men as a class does not justify denying them disability benefits for periods of disability related to pregnancy.

It is of course impossible to determine if any particular individual female will have any disability days. When a female employee who has no disability days or less than average disability days is denied benefits for pregnancy disabilities, while males with many more disability days receive benefits for any disability, and her denial is based on the disability days of other women, she is penalized by attributing to her the general characteristics of women as a class.

C. Where sex discrimination is in any part a factor in an employer's denial of a benefit of employment, the employer has violated Title VII.

GE in the district court explained its denial of disability benefits for pregnancy-related disabilities as justified by the allegedly greater average cost of disability benefits for females as computed by averaging the cost for all females and comparing it with a similar average cost for males. Whatever other factors may have entered into GE's decision not to cover pregnancy-related disabilities, the fact that sex averaging principles entered into GE's decision establishes a violation of Title VII. Congress explicitly rejected proposed amendments to Title VII which would have limited its prohibition against discrimination to instances

where the discrimination was based "solely" on sex. 110 Cong. Rec. 13837-38 (June 15, 1964).

GE contends (II App. 600-601, III App. 879) that many women, allegedly 40 per cent, did not return to work for GE following maternity leave in 1970 and 1971 (See Gilbert original Brief p. 91 for the defect in these figures).[36] Such contention similarly involves prohibited "sex averaging". The 60 per cent of the women who do return should not be penalized because they are members of a sex defined group of whom 40 per cent do not return.[37] The Third Circuit in *Wetzel,* 511 F.2d 199, 208, stated:

> "The legal standard articulated by the EEOC requires that women be considered on an individual basis on their own particular capabilities and not on 'characteristics generally attributed to the group.' 29 C.F.R. § 1604.2(a)(1)(ii). A policy, therefore, that is founded on generalizations, such as most women after giving birth * * * do not return to work after giving birth, is discriminatory because it makes no provision for considering individual capabilities."

[36] Xerox Corporation has had a striking increase in rate of return following inclusion of pregnancy-related disabilities under its disability benefits plan which was described in Gilbert Original Brief, Appendix S, pp. 76a-91a. The rate of return in 1973 was 46 per cent, 1974, 59 per cent, 1975, 69 per cent. See Appendix P, p. 25a, infra. During the hearings before Congress in 1946 which led to inclusion of pregnancy disabilities in the original railroad disability benefits program, supporters of the bill had testified it would benefit employers by reducing turnover. See testimony quoted, pp. 27-28, supra.

[37] See *Polston* v. *Metropolitan Life Ins. Co.,* 11 FEP Cases 380, 388 (USDCWD Ky. 1975) where the court noted the employer's contention that:

> "730 women employees of the defendant will become pregnant each year and * * * probably 30 percent of them will not return to their employment at the company, but will receive disability benefits, and hence will be unjustly enriched in this way at the expense of other employees. This argument seems to be a combination of a reverse discrimination argument and a cost argument, but whatever it may be, it has no merit in the context of a Title VII case.
>
> "Other employees who receive disability benefits can terminate their employment also if they wish to and receive the same benefits as well as the members of the plaintiff's class."

D. The study of the New York State Life Insurance Department does not justify an assumption that females employed by GE or that females generally have a greater incidence or duration of disability than similarly situated males.

The study of the New York State Life Insurance Department,[38] hereinafter called New York Study, sets forth as Table 11, Social Security Disability Experience which shows a markedly higher incidence rate for males than for females in every age group and a ratio of female claim cost to male claim cost showing higher male cost in five out of nine ages, with only slightly higher costs for females in age groups 32-47. This table is as follows (New York Study, p. 22):

[38] State of New York, Department of Insurance, Disability Income Insurance Differentials Between Men and Women, June 1976.

TABLE 11

Social Security Disability Experience—All Occupations

Incidence Rates, Annuity Values, and Net Single Premiums Based on 2.50% Interest and Experience of the Disability Insurance Program

	Male			Female			
Central Age	Incidence Rate Per 1,000 [a]	Annuity Value $1,000/Yr. [b]	Net Single Premium (Claims Cost) Per $1,000 [c]	Incidence Rate Per 1,000 [a]	Annuity Value $1,000/Yr. [b]	Net Single Premium (Claims Cost) Per $1,000 [c]	Ratio Female Claim Cost/Male Claim Cost
22	1.460	$12,834	$ 18.74	0.600	$16,365	$ 9.32	0.50
27	1.750	12,747	22.31	1.080	15,883	17.15	0.77
32	2.320	12,131	28.14	1.980	15,032	29.76	1.06
37	3.390	11,299	38.30	3.120	13,866	43.26	1.13
42	4.990	10,437	52.08	4.460	12,426	55.42	1.06
47	7.830	9,302	72.84	6,810	10,836	73.80	1.01
52	13.020	7,783	101.34	11.150	8,843	98.61	0.97
57	23.090	5,649	130.45	18,660	6,113	114.09	0.87
62	32.990	2,360	77.88	19.740	2,368	46.75	0.60

Source: Office of the Actuary, Social Security Administration, March 26, 1976.

[a] The incidence rates are based on estimated experience through 1975.

[b] The annuity value represents the present value of a continuous annuity to someone who becomes disabled at age X, has a 6.5 month waiting period, and receives payments until attainment of age 65. The 6.5 month waiting period represents the nominal five month-elimination period plus an average lag of 1.5 months before payments actually commence. The termination rates used in the calculation of the annuity values are based on 1968-74 experience.

[c] The net single premium is for a one year non-renewable term disability policy.

The New York Study explains the difference between the disabilities tabulated in the New York Study and that tabulated in the Social Security Study (p. 21):

> "The Social Security coverage is of a universal nature insuring almost the entire workforce, regardless of other disability coverage. Those persons covered by private insurance companies are selected risks who do not regard themselves as adequately insured for loss of income by government programs."

We believe that this explanation makes it apparent that the figures collected by the Social Security Study have much greater validity than those of the New York Study. Indeed, it seems evident from examining the figures collected by the New York Study from private insurance companies that the New York Study suffers from the same defect which this New York Study attributes to earlier data, namely that "the available experience data on insured lives was limited and often inconclusive" because of a "scarcity of claims experience data on disability income insurance coverage for women" attributable in part "to the past reluctance or refusal of insurers to sell this type of coverage to women" (*id.*, p. 2). The continued failure of insurance companies to write individual policies for women is strongly suggested by the low number of claims by women reported by many of the large national companies surveyed. Of the 21 companies surveyed one third had less than 500 claims apiece by women. These seven companies and the number of claims respectively reported are (*id.*, p. 31):

Continental Insurance Company	28
Provident Mutual Life Insurance Company of Philadelphia	142
Grading Life Insurance Company	190
Continental Assurance Company	232
Massachusetts Casualty Insurance Company	358
Continental Casualty Company	378
Union Mutual Life Insurance Company	464

Nowhere in the New York Study is there any indication of the number of male claims on which the data is based. The study compares cost of male and female, but does not disclose any cost figures for males, merely giving the cost for females allegedly computed on the same basis as male costs.

The data collected from insurance companies related only to the experience under individual policies. This is in accord with the purpose of the New York Study to establish regulations governing rates for individual policies. But in view of the historical efforts of insurance companies to sell as many policies to males as possible but to sell as few as possible to females, the female who succeeds in getting a policy, despite insurance company reluctance, represents a person who feels a much greater need for the policy than most of the males who succumb to the blandishments of the insurance salesmen.

The New York Study showed a significantly lower rate of continuation of claims of females into the second benefit year than of claims of men (*id.*, p. 16):

TABLE 7

Continuation of Claims Through the End of Second Benefit Year [a]

Occupation Class I

Attained Age	Percent of Second Year Claims Continuing to End of Year	
	Male	Female
20-39	46.6	37.1
40-49	52.1	46.8
50-59	62.7	47.2
60-69	63.9	62.2

[a] See Appendix K for detailed table from which this summary table was drawn.

E. Other data showing higher incidence and duration for males than for females of work time lost due to disability require the conclusion that there is no difference between males and females in this respect.

In addition to the experience of the Social Security Administration (see pp. 45-47, *supra*), data collected by various other responsible sources establish that there is no overall consistent pattern of higher incidence of work loss due to disability for females than for males.

A recently issued analysis prepared by the Metropolitan Life Insurance Company, based on the 1970 census, concluded that in every age group and every occupation women lost less time from work due to disability than men. The Metropolitan Life Statistical Bulletin, November 1975, p. 11, states:

> In every age and occupation group, fewer women reported work disability than did men; the rates ranged from approximately 20 percent less in the

case of craft workers to nearly 60 percent less for clerical workers. For all employed persons as a group, women registered a disability rate of 55 per 1,000, or about 35 percent below the 85 per 1,000 recorded by men.

The Bulletin summarizes sex differences by age and occupation as follows (pp. 9-11):

> Among males in 1970, the lowest rate of work disability was found among white collar workers—77 per 1,000—or about 10 percent less than the 85 per 1,000 recorded for all employed men as a group. Work disability rates were 84 per 1,000 among blue collar workers, 115 per 1,000 among service workers, and 121 per 1,000 among farm workers. Among women, work disability rates ranged from 43 per 1,000 among white collar workers to 85 per 1,000 among farm workers. The rate for all employed women as a group was 55 per 1,000. (See table.)
>
> In the white collar occupations, professional and technical workers had the most favorable record, with work disability rates of 61 per 1,000 for men and 38 per 1,000 for women. The poorest record for those in white collar occupations was found among males in clerical occupations and among females in sales positions. Of the blue collar workers, craftsmen had the lowest rates—78 per 1,000 for men and 63 per 1,000 for women—while laborers had the highest work disability rates.
>
> * * *
>
> The rates for men rose from 62 per 1,000 at ages 18-44 to 147 per 1,000 at ages 55-64, while the rates for women increased from 39 to 97 per 1,000.

The accompanying table, to which reference was made in the above quotation, is as follows (p. 10):

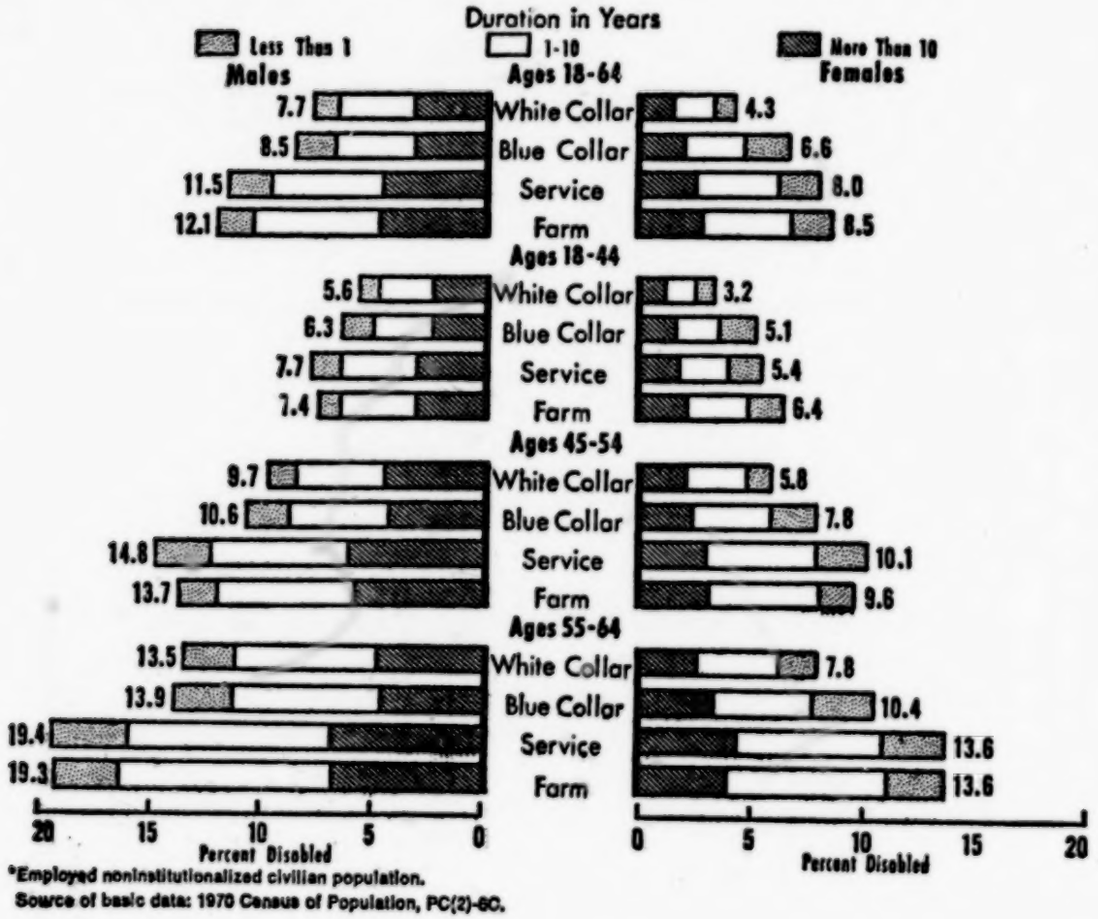
WORK DISABILITY BY OCCUPATION
United States, April 1970
Number of Persons Disabled per 1,000

Occupation Group and Race	Males at Ages			Females at Ages			
	18-64	18-44	45-54	55-64	18-64	18-44	45-54	55-64
All Employed Civilians	84.9	61.5	106.8	146.7	54.8	39.0	70.8	97.4
White	85.1	61.3	107.0	146.6	52.2	36.8	67.0	92.6
Negro	84.6	63.9	106.8	150.9	74.8	54.3	104.5	141.6
Spanish origin	83.8	68.2	116.0	149.5	64.7	53.3	91.0	124.8
White Collar Workers	76.7	55.8	97.5	135.4	43.3	31.6	57.8	78.0
Professional and technical workers	61.1	48.2	81.6	108.7	37.5	27.2	52.4	66.2
Managers and administrators, except farm	77.2	52.2	90.2	129.9	55.5	37.1	63.7	82.4
Sales workers	88.6	61.5	113.1	157.8	60.7	41.8	72.8	97.9
Clerical workers	95.3	71.4	126.0	163.0	41.3	31.6	55.4	77.0
White	77.2	56.0	97.7	135.6	43.9	30.7	57.1	77.3
Negro	69.9	55.4	99.3	132.0	48.7	40.6	73.6	97.5
Spanish origin	75.9	60.6	113.2	151.1	49.1	41.1	71.5	113.3
Blue Collar Workers	84.2	63.4	106.1	139.3	65.7	51.0	77.7	103.7
Craftsmen	77.8	55.4	97.6	132.1	62.9	48.7	74.8	93.4
Operatives	87.0	67.3	110.6	145.9	65.6	50.7	77.3	104.8
Laborers, except farm	97.7	76.1	129.0	158.0	73.6	60.0	91.2	108.6
White	84.7	63.3	107.0	139.4	65.0	49.8	75.6	101.5
Negro	81.0	63.3	99.4	141.9	71.0	57.0	99.1	133.3
Spanish origin	82.5	69.5	110.5	142.4	77.8	66.6	102.9	121.9
Service Workers	115.2	76.6	147.1	193.4	80.3	54.1	100.4	135.5
White	117.3	76.7	152.1	198.9	74.4	49.3	92.9	128.7
Negro	109.0	76.7	131.9	174.4	98.8	68.8	120.2	155.3
Spanish origin	103.9	82.2	138.5	165.3	76.3	59.8	100.9	136.4
Farm Workers	120.7	74.4	137.1	192.8	85.2	64.5	95.7	136.0
White	121.0	74.1	136.5	194.2	82.2	59.8	91.5	129.6
Negro	118.5	78.1	145.2	184.9	102.7	78.7	125.6	173.0
Spanish origin	91.1	63.5	131.9	157.2	75.6	66.9	77.5	159.7

Note: Excludes inmates of institutions.
Source of basic data: 1970 Census of Population, PC(2)-6C.

An accompanying bar graph is as follows (p. 11):

DURATION OF WORK DISABILITY BY OCCUPATION, UNITED STATES, 1970 *



*Employed noninstitutionalized civilian population.
Source of basic data: 1970 Census of Population, PC(2)-6C.

F. To the extent that statistics show that females as compared with males have a higher loss of time at work due to disability, these statistics fail to reflect that males in the same low pay categories as females have a higher disability time work loss.

There is a much wider disparity in extent of time lost due to disability by males in the lower pay brackets as compared with males in the higher pay brackets than the disparity between the sexes. In the main brief for Gilbert, pp. 148-150, we quoted and set forth tables from the studies of the experience under the California and New Jersey disability benefits statutes which showed a greater relation in days disabled by wage than by sex. Statistics included in the report on Time Lost From Work Among the Currently Employed Population, United States—1968, show that males with incomes of less than $3,000 lose 7.6 days from work as compared with 3.9 days for males with incomes of $15,000 or more.[39] The detailed analysis is as follows:

[39] U.S. Dept. of Health, Education and Welfare, Public Health Service, Health Services and Mental Health Administration, Vital Health Statistics, Series 10—Number 71, Series 3 (GPO 1972), p. 15.

TABLE 3. *Days lost from work and days lost from work per currently employed person per year, by family income, sex and age: United States, 1968*

[Data are based on household interviews of the civilian, noninstitutional population. The survey design, general qualifications, and information on the reliability of the estimates are given in appendix I. Definitions of terms are given in appendix II]

Sex and age	All incomes [1]	Less than $3,000	$3,000-$4,999	$5,000-$6,999	$7,000-$9,999	$10,000-$14,999	$15,000 or more
	Days lost from work per currently employed person per year						
Male							
All ages 17 years and over	5.2	7.6	7.0	5.3	5.3	4.2	3.9
17-24 years	4.6	4.2	5.1	4.4	5.2	5.6	2.5
25-44 years	4.3	6.2	6.0	5.1	4.6	3.0	3.0
45-64 years	6.4	11.9	10.0	5.9	6.6	5.3	4.9
65 years and over	5.5	7.1	6.0	7.2	*	*	*
Female							
All ages 17 years and over	5.9	6.4	6.7	6.1	5.4	5.6	5.4
17-24 years	5.1	4.3	6.1	6.0	4.5	5.8	4.4
25-44 years	6.0	9.7	6.4	6.3	5.7	4.9	5.4
45-64 years	6.2	5.8	7.4	6.0	5.7	6.1	6.1
65 years and over	6.5	6.0	*	*	*	*	*

[1] Includes unknown income.

The GE experience in 1970 and 1971 in terms of days disabled for claimant for disability benefits was 48 days for males as compared with 52 days for females in 1970, and 47 days for males as compared with 52 days for females in 1971 (I App. 244). In terms of length of disability these figures are so close that they can be regarded as showing no difference in duration. The comparable rate of incidence fluctuated widely between 1970 and 1971 and affords firm support for the district court's holding that these figures do not constitute a basis for finding that the cost of women's per capital disability was somewhat more than the males' per capita disability. (Jt. App. 32a). The number of new male claims in 1970 was 77 as compared with 99 female, in 1971 was 173 as compared with 217 female (I App. 244). The stipulated exhibit showing comparative male-female distribution in pay brackets as of December 1972, showed 43 per cent of GE's female employees below the entry level common labor grade for male employees, as compared with 6 per cent of GE's male employees (I App. 177-178, III App. 883-953). The 6 per cent of GE males in labor grades below the entry level common labor grade for males is due to male employees bumping back into traditionally female jobs rather than taking a layoff and to newly hired males who had not progressed to the entry level grade. The average pay of the GE male employee in 1973 at straight time rates was $9,200 as compared with $7,750 for females (II App. 608-609). This evidence warrants the conclusion that any higher per capita cost for disability benefits for the average female employee of GE figured by sex averaging as GE has done in computing cost (I App. 244) is the result of the disproportionate number of women in low paying jobs rather than a result of physiological sex differences.

G. If averaging of costs by sex is in any respect relevant, the averaging should cover all fringe benefits and not merely disability benefits.

There are numerous fringe benefits as to which the cost, calculated by GE's method of sex averaging, would be much higher for the male per capita than for the female. The most obvious instance is life insurance, where premiums for female policies are higher than for male policies because of the greater average longevity of females. Likewise with the "military pay differential" and the "military duty allowance" (I App. 208, III App. 872, 974, 975, 979, III App. 1051-1052, IV App. 1942), if the total cost for all male employees is averaged among all males and the total cost for all female employees is averaged among all female employees, the figure for males will greatly exceed that for females. The record here does not contain the data from which these averages could be furnished. The plaintiffs at the inception of the suit propounded interrogatories to GE seeking to obtain the annual cost for each of the preceding five years of all fringe benefits for all employees by sex and the average cost per employee by sex (I App. 209-210, Interrogatory 37) but GE objected on the ground of relevancy (I App. 297), failed to supply the information, and the plaintiffs did not move to compel answers.

If the extent to which the cost to employers for one sex compared with the other has any relevance to the failure of an employer to pay disability benefits for pregnancy-related disabilities, there would seem to be no basis for basing a claim of the equality of present benefits by looking at only the cost of disability benefits to the exclusion of the comparative cost of all fringe benefits.

H. Payment by GE of disability benefits for pregnancy-related disabilities would merely equalize the per capita costs to GE of reproduction by female employees as compared with male employees.

If sex averaging by the method proposed by GE were relevant to a determination of whether the payment of disability benefits for pregnancy-related disabilities would equalize or create an imbalance between benefits for male and female employees, it would be logical to figure the sex averages of the cost to GE of reproduction by male as compared with female employee. In 1971 GE paid hospital and medical expenses for 2,772 pregnancies by female employees, 10,279 pregnancies by wives of male employees (I App. 237, answer of GE to Interrogatory No. 36). In 1971 GE had 224,192 male employees, 84,056 female employees (I App. 236, answer of GE to Interrogatory No. 33). This amounts to 45 babies for 1,000 male employees, 32 babies for 1,000 female employees or 1⅓ more babies per male than female.

The record here does not show the cost to GE of hospital and medical expenses for pregnancy. The plaintiffs sought this information from GE by interrogatory, but GE answered that the data was not available (I App. 237). Accordingly, plaintiffs have gone outside the record to obtain information as to the cost of hospital and medical expenses for delivery period as to which the record supplies data as to number of births and average rate of disability payments. Frederick S. Jaffe, vice president of the Planned Parenthood Federation of America, testified in Hearing on National Health Insurance before the Committee on Ways and Means, U.S. House of Representatives, 93rd Cong., 2d Sess., June 28, 1974, vol. 7, p.

3158, that a study he conducted together with Professor Charlotte Muller of City University of New York showed the average cost of physicians' and hospital services for a healthy live birth in 1970-1971 was $1118. Engaging in the kind of sex averaging which GE has used to compare average disability cost per female with disability costs per male and using the above figure of $1118, physicians and hospital costs per male employee in 1971 would be $51.25, per female employee $36.75.

Thus, in 1971, GE by hiring females, saved $14.50 per female on physicians and hospital benefits for pregnancy because the birth rate of its female employee was lower than for its male employees.

The district court found that "absent complications, there is no medical reason for not allowing a woman to work to the day before delivery or for limiting her activities prior to delivery" (Jt. Pet. 19a) and that "The medical rule of thumb is that six weeks are required for recuperation from delivery." (Jt. Pet. 19a). Where there are complications the disability is due to a sickness or accident—a disease—and the payment of disability benefits can in no sense be regarded as for normal pregnancy rather than the accepted sickness and accident. We thus believe for making this comparison a six weeks figure is appropriate.

In 1971 the average sickness and accident benefits cost GE $9.97 per day or $69.79 per week per female employee, if figured by averaging only costs of females (I App. 227-228, 260, answer of GE to Interrogatory 75). The cost of six weeks' disability benefits $418.24) per female on a per capita basis (using total female employees to figure per capita) would cost GE $13.78

for each female employee. If GE paid disability benefits to female employees for pregnancy and child birth disability, the total cost per female of physician, hospital and disability benefits would have been $50.53 in 1971, or 72 cents less than the cost of hospital and physician benefits alone per male employee for each child his wife bore him.

We believe these figures emphasize the fairness of paying disability benefits to female employees who are disabled by pregnancy and child birth and establish that GE's concern about inequality or disbalance between males and females (GE Supplemental Br., pp. 17-25) is factually as well as legally unsupportable.

I. If sex averaging or balancing of benefits between the sexes viewed as two separate groups were under any circumstances consistent with non-discrimination, the complete omission of pregnancy disabilities would still not be.

We do not believe this case requires this Court to decide the issue now pending before the Ninth Circuit in the *Manhart* and *Henderson* cases (see pp. 40-41, *supra*), whether both costs and benefits must be equal. We believe that issue arises only in cases of insurance plans or pensions where costs and benefits are computed on an actuarial basis. While we believe that imposing on employees either unequal costs when benefits are equal or unequal benefits when costs are equal violates the right of each individual employee to be treated equally with each individual employee of the opposite sex without attributing to either the benefits or detriments of an average based on one sex as a group, this case does not present a plan with equal benefits at unequal cost to the employees or a plan with equal cost but unequal benefit. The exception to full equality which has been applied by the Wage and Hour

Administrator of the Equal Pay Act 29 USC 206(d) by the Department of Labor, Interpretive Bulletin, 29 USC § 800.116(d), quoted in GE reply brief p. 15, Section 800.116 is inconsistent with the Department of Labor's ban on sex averaging stated in Section 800.151, 29 CFR § 800.151, quoted pp. 39-40, *supra*. The Department of Labor is reconsidering this regulation in light of its conflict with the EEOC's Sex Discrimination Guidelines, 38 Fed. Reg. 35336, 35337 (December 27, 1973)[40].

However, this exception to the ban on sex averaging has been strictly limited to cases involving insurance where the dollar and cents premiums due were unequal for the equal dollar and cents benefits or the dollar and costs benefits were unequal for the equal dollar and cents premiums. It has never been applied to excluding a type of coverage and then characterizing the benefits as equal.

[40] See statement in Brief of United States Equal Employment Opportunity Commission As Amicus Curiae in *Manhart* v. *City of Los Angeles*, 9th Cir. Cases has 75-2729, 75-2807, 75-2905, at p. 28.

V.

GE's Policy, and the Policy of the Insurance Industry to the Extent That GE Followed It, Are Based on Stereotyped Concepts About the Propensity of Females to Malinger Which the Court Below Found Untrue. An Employment Practice Grounded on Sex Stereotypes Constitutes Prohibited Discrimination Because of Sex and Supports the Finding Below of Invidious Motivation

Before addressing ourselves to GE's heavy reliance upon alleged insurance practice, we wish again to remind the Court, as is more fully set out in our earlier brief (Gilbert original brief pp. 16-17), that there is no insurance involved in this case. GE has not insured any of its undertaking to its employees to provide them income when they are disabled from work by sickness or accident (I App. 175-176, 211, 218-219, 241). Nor does GE follow actuarial principles in its maintenance of income for its employees during periods when they are disabled. Thus GE's reliance on alleged insurance practice is by way of analogy only.

A. Because of court decisions dating back a century holding that disabilities from childbirth constitute sickness, such disabilities are within the coverage of sickness in insurance policies unless expressly excluded.

Judicial precedent for the meaning of the word "sickness" as applied to the period a woman is disabled by childbirth dates back to *Queen* v. *Wellings*, 3 Q.B. Div. 426 (The Law Reports 1877-1878). There the deposition of the principal witness in a rape case was offered. Under the statute (11 & 12 Vict. C. 42, S. 17(1)), the deposition could only be admitted if the witness was "so ill as not to be able to travel". There was no medical evidence introduced. The husband of

the principal witness reported his wife was momentarily expecting to deliver. The argument for the prisoner was the same as the principal defense in the answer filed by GE in this case, which states, "Pregnancy and resulting childbirth are neither sicknesses or the result of accidents; they are rather normal physiologic functions" (I App. 33). The report of the case quotes the following as argument of counsel for the prisoner:

> "The case shows that nothing except pregnancy operated to prevent the deponent from attending the trial. Pregnancy is not an illness or disease, but a natural condition; therefore, although the witness may have in fact been unable to travel, such inability was not within the statute."

The decision of Lord Coleridge is reported as follows (at 428):

> "We all think this conviction should be affirmed. Pregnancy may be a source of such illness as to render the witness unable to travel and be an illness within the statute."

The above decision by Lord Coleridge was cited and followed in an early case involving the discharge of a school teacher for pregnancy. Under the statute she could not be discharged for an absence due to temporary illness. The court held the absence for pregnancy was an absence for a temporary illness and reinstated her. *People ex rel Peixotto* v. *Board of Education,* 82 Misc. 684, 144 N.Y. Supp. 87 (Sup. Ct. 1913), *rev'd.* on other grounds, 145 N.Y. Supp. 853 (App. Div. 1914). The Court stated (82 Misc. at 694, 144 N.Y. Supp. at 93):

> "It is pure sophistry to argue, as does the learned counsel for respondent in his brief, that maternity

> is an indication of health, and therefore cannot be said to cause 'serious personal illness'. The same argument was urged in the *Queen* v. *Wellings* (3 Queens Bench Division 426) by the counsel for the defendants in that case; but it was overruled by the Court of the Queen's Bench."

In view of these and other similar cases the insurance industry has drafted policies on the assumption that language which insures against losses due to sickness and accidents, whether by way of insurance against loss of income during disability or for hospital and physicians' bills, covers pregnancy-related disabilities unless expressly excluded. Similarly, GE in its Weekly Sickness and Accident Insurance Plan after assuring its employees that they would receive 60% of their income whenever they become disabled by sickness or accident (III App. 1064), in implied recognition of the fact that pregnancy-related disabilities would be covered unless excluded, wrote in an express exclusion (II App. 1066).

B. The insurance industry has not regarded the exclusion of pregnancy-related disabilities as mandatory in disability income policies but rather optional.

An examination of the technical literature in the field of insurance discloses that the insurance industry accepts the loss of income due to disabilities from pregnancy as an insurable risk which is properly included in a policy covering generally the risk of loss of income from sickness or accident. Exclusion of pregnancy-related disabilities is not regarded as an essential feature of a disability benefits policy. Rather it is regarded as an optional exclusion. Illustrative is

the following in the leading work on disability and health policies:[41]

> "Disability income policies customarily contain several of the following exceptions as to cause or circumstances of loss, although any of these except, perhaps, the first, may be omitted from any particular insurer's contracts:
>
> "1. War or act of work, whether declared or not.
>
> "2. Any period while the insured is in the armed forces of any country, usually coupled with a pro rata refund of premium for the period of service, and sometimes with a right to resume coverage after discharge.
>
> "3. An extended period of residence or travel abroad.
>
> * * *
>
> "4. Attempted suicide or intentionally self-inflicted injury.
>
> "5. Air travel, except as a fare-paying passenger.
>
> "6. Pregnancy, including resulting childbirth or miscarriage or complications thereof.
>
> "Some policies providing both sickness and accident coverage also list certain conditions which will be covered only under the sickness provisions of the contracts."

C. The prevailing pattern in American industry is to provide disability benefits for pregnancy-related disabilities for six weeks.

As set forth in our main brief (Gilbert original brief, pp. 52-53, 69) the prevailing pattern in American in-

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[41] Edwin L. Bartleson, Health Insurance Provided Through Individual Policies (published by The Society of Actuaries, 2d ed., 1961) pp. 21-22. The same optional exceptions are suggested with respect to policies covering medical expense benefits, see p. 40.

dustry is to include in temporary disability plans, coverage for pregnancy-related disabilities, the benefits to be paid in the same weekly sum as for other disabilities, but subject to a maximum duration shorter than for other disabilities, the usual maximum for pregnancy-related disabilities being six weeks, sometimes eight weeks. Sixty percent of the employees in the United States covered by disability policies have the six or eight weeks' coverage for pregnancy-related disabilities (Gilbert original brief, pp. 52-53, 69). Although the plaintiff IUE had over the years during negotiations called GE's attention to the practice of other employers in this regard, including GE's competitor GM, no change was made by GE in its refusal to pay any disability benefits for pregnancy-related disabilities (Gilbert original brief, pp. 54-55).

D. The prevailing pattern in American industry in all fringe benefit programs, except those for pregnant employees, is to provide male and female employees equal benefits, either on a non-contributory basis or without differences in contribution based on sex.

Ninety-five per cent of the employees in private industry are today under plans which provide all fringe benefits, except those related to pregnancy, equally to male and female employees.[42] This includes pensions,[43]

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[42] Hearings before the Office of Federal Contract Compliance, Employment Standards Administration of the U. S. Dept. of Labor, on OFCC Sex Discrimination Guidelines, Section 60.20.3(c), Washington, D. C., September 9, 1976, pp. 21-23, 25, 72-73. Pertinent excerpts are printed as Appendix B to this brief, pp. 6a-8a, *infra*.

[43] See U. S. Department of Labor, Bureau of Labor Statistics, Digest of Selected Pension Plans, 1973 ed., which summarizes the principal features of selected pension plans for office and non-

life insurance,[44] health and disability benefits.[45] Similarly, federal employees under the Civil Service Retirement System, the Federal Employee's Group Life Insurance Program and Health Benefits Program and most state employees receive sex neutral benefits.[46]

These plans use actuarial tables to figure costs but the tables are not used to affect either the contribution

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office employees in the private sector of the economy. The employers whose plans are digested are arranged alphabetically with several pages devoted to an analysis of each plan. The standard pattern in American industry is a retirement annuity computed by a formula based on years of service and earnings. This formula results in identical single annuity pensions for male and female employees with the same work experience. There have been two exceptions. The only exception now prevalent to any substantial degree is the joint survivor annuity option, when an employee elects an annuity for a surviving spouse. Under these plans the employee can elect a single annuity which is sex neutral. Only if the amount of that annuity, at the election of the employee, is used to purchase a survivor annuity, is the sex neutral principle abandoned and a sex actuarial table used. Hearings OFCC, September 9, 1976 Guidelines, pp. 21, 81-82. The second exception has been early retirement where a few plans permitted females to retire prior to the normal retirement age at full pension whereas males would be forced to take a reduced pension if they retired early. This early retirement for women at full pension is the reverse of actuarial principles. Male employees or their estates filing suits under Title VII as victims of discrimination because of sex under these plans have been uniformly successful. See the *Rosen, Chastang, Ugiansky, Mixson* and *American Finance* cases cited fn. 19, pp. 21-22, *supra*. Most plans have now been amended to provide the same ages of early retirement and the same benefits for both males and females. See also Hearings, OFCC Guidelines, September 9, 1976, pp. 22-24 printed pp. 6a-7a, *infra*.

[44] Hearings, OFCC Guidelines, September 9, 1976, pp. 25-26, printed at p. 8a, *infra*.

[45] See U. S. Dept. of Labor, Bureau of Labor Statistics, Digest of Health and Insurance Plans, 1974 ed., which parallels the Digest of Pension Plans described in fn. 43, *supra*.

[46] Hearings, OFCC Guidelines, September 10, 1976, p. 80.

or benefits of employees on a sex basis.[47] Thus, it is apparent that sex-differentiated tables do not of necessity have to lead to sex-differentiated benefits. Benefits can be designed completely independently of the tables used. In deriving the cost of a given plan, the sex composition of the group will affect the cost of the plan but will have no bearing on the amount of the benefits of such plan.

As an example of this we can point to the Civil Service Retirement System providing sex-neutral benefits. Under this plan an employee, whether male or female, receives a formula benefit at retirement. If he or she retires before age 55, the benefit is reduced by 2 per cent per year that retirement is prior to age 55. If a joint and 55 per cent survivor benefit is to be provided, the normal benefit is reduced by 2½ per cent of the first $3600 of annual benefit and 10 per cent of the excess over $3600. Survivor and children's benefits are all provided on identical bases for males and females with equal service and pay histories. The benefits are prescribed by law and are not affected by actuarial tables in use at any time.[48]

The sex neutral feature of the Civil Service Retirement System is also a feature of the Federal Employee's Group Life Insurance Program and Health Benefit Program. The benefits in all these programs are not sex-related and are therefore not affected by the actuarial factors used. Only the costs are affected by the actuarial factors used at any time.[49]

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[47] Hearings, OFCC Guidelines, September 9, 1976, p. 80.

[48] *Id.*, pp. 80.

[49] Unpublished papers prepared by Ethel C. Rubin, A.S.A., N.A.A.A., U.S. Civil Service Commission.

In private industry the most standard employer plan (about 95% of the plans) is the "fixed benefit" plan which provides monthly benefits according to formula. Sex does not enter into the determination of the normal form of benefit in this type of plan. Several examples of such plans are:

A. Fixed dollar amount per year of service

B. Percentage of salary times years of service

C. Percentage of final salary, three year average or five years average salary times years of service.

Based on the traditional sex-differentiated tables, the cost of the fixed benefit for the female is higher than for the male. This is taken into account in determining the total cost of the plan. However, it does not affect the actual monthly benefits under such a plan.[50] Most of these plans are non-contributory. Where contributory, the contributions are made on a sex neutral basis.

The sex neutral character of these plans is consistent with the basic insurance principle of spreading the risk. The principle of insurance is contingent on risk spreading. There is an inherent paradox involved in trying to relate attention to the individual with basic insurance principles. The very nature of insurance demands that predictions about the individual and assignment of risk be based on group experience. It is erroneous to assume that the division of a pool of individuals into two pools, male and female, makes insurance more individualistic, that it saves some members

[50] Hearings, OFCC Guidelines, September 9, 1976, pp. 59-60, 73.

of the group from an unfair burden of extra risk. This carried to its logical extreme would indicate the desirability of differentiating to the nth degree, trying to analyze color, family background, medical history, physical and personal habits of each individual to make a precise determination of the probability of death. But this would destroy the group risk-sharing which is the very reason for group insurance. The individual's guarantee in a pension or insurance plan comes in the form of equal treatment as a member of a larger group. The goal then is not to make blacks and whites, smokers and non-smokers, married and non-married, males and females equal to each other, but to treat all people equally without differentiation on the basis of these group characteristics. Consistent with the basic pattern of insurance should be the inclusion of disability from pregnancy.

E. The stereotyped belief that women employees differ from male employees in that women will make unfounded claims for disability insurance if coverage in excess of six weeks is provided for pregnancy-related disabilities, is the basis on which the insurance industry has been reluctant to write such coverage.

The insurance study which GE has presented to this Court contains the assessment of the New York State Department of Insurance, which GE describes as "prestigious," that the insurance industry has been reluctant or refused to sell disability income insurance to women (NY Study, p. 3). This statement has reference to selling women any insurance against risk of loss of income due to disability. The New York Insurance Department was not talking about writing disability income insurance policies for women but excluding pregnancy. Such reluctance or refusal to write disability income insurance for women consti-

tutes discrimination because of sex. That this discrimination is not a thing of the past in the insurance industry is evident by the token character of the writing of this insurance for women at the present time (see pp. 47-48 *supra*).

Both by testimony during the trial and in its briefing here GE has attributed its exclusion of pregnancy-related disabilities to GE's following of insurance practice. The testimony here shows that this insurance practice was based on unfounded assumptions as to the nature of women, not about pregnancy. This is apparent from the testimony produced by GE to explain the insurance practice and GE's reliance thereon.

The testimony of GE's witnesses as to the motivation of GE and the insurance industry in denying coverage shows it was based on the belief that women would malinger, not merely when they were pregnant, but when they were not.

During the trial in this case GE called as its expert witness with regard to insurance practices Paul H. Jackson, who has had a life time of experience as an actuary, having joined the Aetna Life Insurance Company in 1949 as an actuarial trainee (II App. 522). The testimony of Jackson as to the reasons of the insurance industry for denying coverage to pregnancy related disabilities shows that the insurance industry excluded on the basis of its belief that women would malinger, not merely when they were pregnant, but when they were not pregnant (II App. 529-538, 548, 550, 553).

Jackson explained the reluctance of insurance industry to cover pregnancy-related disabilities for purposes of disability income policies as due to claims abuse.

He testified that women had a "natural tendency" to want to "take it easy" before child birth and "to want to remain at home with the child as opposed to working" which would result in claims abuse (II App. 554-555). He further testified that mothers would be tired from being up nights feeding the baby, stay home and collect disability (II App. 533). Cf. *Stanton* v. *Stanton,* 421 U.S. 7, 10-14 (1974) where this Court characterized reliance on "old notions" as stereotypes manifesting sex prejudice.

The trial judge interrupted Jackson to inquire whether when he spoke of staying home he was testifying to an actual fact or just his opinion as a man (II App. 534). Jackson answered that it was his "opinion both as an actuary and as a man" (II App. 534). Pressed further as to whether he had actual figures or any statistics on malingering in connection with pregnancy Jackson replied that there was no actuarial experience with respect to pregnancy (II App. 535).

Jackson further testified that all pregnant women would file disability claims for the maximum period of coverage under 13 week policies, 23 weeks under 26 week policies and 30 weeks under 52 week plans (II App. 548-550, 554, III App. 846-847). Again he admitted that he had no experience upon which to base this testimony (II App. 549). According to Jackson five percent of the women would engage in the further claim abuse of drawing permanent disability benefits until age 65 when they would transfer to a pension (II App. 537, III 846). Jackson foresaw that all of these claims will be so unfounded that the employer will pay them in full instead of having his payments reduced by the amount of Social Security disability

benefits (II App. 533), which by the terms of GE's long term disability plan supplements the Social Security disability benefits (III App. 1073).

Jackson further testified women who were pregnant would get jobs simply to collect disability benefits (II App. 538), and that women would get pregnant just for the purpose of collecting disability benefits (II App. 532-533).

Jackson testified that one of the controls on which the insurance industry relied to prevent claims abuse would be lacking here. He explained that the traditional control of desire for career advancement which caused employees to return as soon as possible for fear of missing a merit increase or a promotion would not operate with women who were pregnant or following child birth (II App. 531).

When Jackson was questioned by the judge during this testimony (II App. 534-535, 554, 549-558, 563-564) as to what factual basis he had for these statements, Jackson admitted that he did not know of a single company that had any claim abuse problem with a maternity claim (II App. 540-541) and knew of no statistics (II App. 534-535) or experience (II App. 540-541) to support his statements. When pressed for the basis of his testimony that women abuse disability insurance in the manner in which he had described, Jackson explained that he knew because "I have had perhaps a dozen secretaries have babies and leave and I can't help but look at the situation and draw some conclusion of my own" (III App. 563).

F. GE did not follow the insurance practice because GE did not pay any disability benefits to women employees disabled by pregnancy, but, to the extent GE relied on insurance practice, it adopted the stereotypes of the insurance industry and added further stereotypes about women. GE discriminated because of sex.

GE's reliance upon the alleged practices of the insurance industry upon analysis turns out to be reliance upon the insurance industry's reluctance to write disability insurance for pregnancy-related disabilities which provide a maximum benefit in excess of 6 or 8 weeks. The insurance industry today has no reluctance to insure other risks dependent on the incidence of pregnancy. Both GE and industry generally carry health insurance for hospital and medical expenses of employees and their dependents which covers hospital and medical expenses for the delivery of babies of dependents of male employees as well as the babies of female employees (Gilbert original brief p. 22). Even with respect to disability benefit policies, the prevailing practice in industry is to provide some coverage for loss of income due to pregnancy.

Thomas Hilbert, GE's Labor Relations Counsel, explained GE's exclusion of pregnancy related disabilities by reliance on stereotypes. Hilbert testified (II App. 596-597):

> "We feel that the benefit would be subject to abuse, to a stretching of the time of absence.
>
> And we feel that this would occur both before and after delivery.
>
> Before delivery we feel that the *natural concern* of the mother for the fetus, for the possibility of injury to the child, plus her own discomfort, would tend to stretch the time of leaving before pregnancy earlier than it would otherwise be.

"And after the delivery we feel that the *natural affection* of the mother for the child. In some cases *the concern of the mother* for the health or well-being or psychological situation of the child, would tend to stretch the post-delivery absence time.

So we feel that this kind of coverage as contrasted with sickness or accident coverage would be subject to more abuse.

"Despite what I think one of the doctors testified we believe that doctors generally, obstetricians generally, would be sympathetic to the mother and would tend to want to give her the dates she is asking for." (Emphasis supplied.)

Again he relied on the 'normal temptation of the mother before or after delivery to extend her time of absence (II App. 597; see also II App. 634).

Both of the plaintiff's medical experts testified that malingering with respect to pregnancy would be more difficult than with other claims of disability and that in their experience women did not malinger about disabilities connected with pregnancy (I App. 337-338, 351, II App. 476, 478, 504, 519).

The trial court found that "the pregnant women would not, per se, be inclined to malinger more than other persons" (Jt. Pet. 23a).

The fact that GE conformed to historicial insurance practice does not mean that GE does not discriminate. By adopting a discriminatory insurance practice GE itself becomes guilty of discrimination.

The only testimony of Hilbert with respect to the manner in which GE decided to exclude pregnancy-related disabilities makes it evident that GE never

gave any serious consideration to the issue. Hilbert explained that GE's decision not to spend its money for disability benefits for pregnancy-related disabilities was made on the same basis as the Department of Defense acts in deciding where to spend its money, namely, GE spends its money where it will "get the biggest bang for the buck" (II App. 645). The generous character of GE's payment of disability benefits for absences due to hair transplants for males, nose jobs and repair of trick football knees, shows that GE's notion of where it got the "biggest bang for its buck" did not include females.

Further Hilbert's own testimony revealed all the usual stereotyped notions about women. When they have babies they do not need income from their employer because obviously they have a husband to support them. Hilbert revealed this underlying premise with his remark that GE never contemplated when it placed Sherrie O'Steen on unpaid leave that she might have to go on welfare and in the meantime live with her two year old daughter in an unheated house without light, cooking or refrigeration facilities (II App. 444-449). Hilbert testified (II App. 610):

"She was listed as a married employee and in that situation we don't anticipate or look for financial disasters."

This Court in *Stanton* v. *Stanton*, 421 US 7 (1975) held that state action based on this stereotype constituted discrimination because of sex which did not survive close scrutiny under constitutional equal protection standards.

Hilbert's testimony reveals that other equally gross stereotypes were substantial ingredients in GE's preg-

nancy exclusion. He testified that the length of time a female was absent because of a disability from pregnancy would be lengthened in a manner which he obviously but erroneously assumed would not apply when other workers were disabled. He testified that other workers who were in the same incentive pay group with a pregnant employee would resent her presence because she would lower their wages by not doing her fair share of the work (II App. 604). Hilbert based this conclusion on "just my impression of life in the GE Company" (II App. 643). He knew of no facts to support this conclusion. He didn't know whether there had ever been any grievance raising any issue arising from the presence of a pregnant employee at work. He had no recollection of anyone complaining about such a problem (II App. 643).

The cross-examination of Hilbert on this point is as follows (II App. 643-644):

> "Q. What has been your experience about employee attitudes toward a pregnant women in the plant? A. Well, I would say ambivalent, some are protective, chivalrous, helpful protective. * * * Others, I think, are unhappy, frustrated, annoyed. Some others I would assume in any American group, whether a working group or elsewhere, would have probably some problems concerning matters of personal decorum.
>
> "Q. What facts do you have on which you base these statements? A. *Just my impression of life in the GE Company.*
>
> "Q. You have no specifics? A. As you know, we are a company that has many, many plants in different parts of the country. Some urban and some rural. Some even potentially suburban. All kinds of mores from A to Z.
>
> "Q. How much experience have you had in what plants and what years would lead you to this

impression that you have expressed here? A. Oh, *I couldn't pick specifics.* I review periodically grievance matters that our people bring to me. I get phone call from our lawyers, from our employee relations people in the field. I have tried arbitration cases involving things like group incentive matters.

"Q. Do you remember any phone call that reflected an attitude about pregnancy from anyone? A. I would say not specifically, no.

"Q. Do you remember any grievance that raised an attitude about pregnancy from anyone? A. No, not at this moment.

I would, I suppose if I looked back through the files I might find some.

"Q. You don't know whether you would or not? A. Well, I think I would, but I can't be sure.

"Q. You never looked? A. I never looked, no, for this purpose.

"Q. Do you have an impression as the attitude of management in the local plants in regard to the presence of a pregnant women on the work staff? A. Again, GE managers like GE employees generally run the gamut. We have some very, let's call them liberal managers, and we have some prudish managers. Generally speaking a company does not pick its managers in relation to their attitudes on this subject.

"Q. Do you have any specific facts on which you would base a statement as to the attitude of management? A. Well, just that I know the managers, at least a high percentage of them, and had conversations with them and you can't avoid getting some impression of a man's political, moral, even, in a sense, religious approach in those contexts.

"Q. Ever had discussions with any of them about a pregnant employee in the plant? A. I can't recall anything specific." (Emphasis supplied)

Even if grounded in fact, attitudes of other employees do not justify discrimination. The EEOC Guidelines on Discrimination Because of Sex, 29 CFR 1604.2(a)(1)(iii) provide that an employer cannot justify discrimination on the ground of the preferences of coworkers.

The essence of discrimination because of sex is action based on stereotyped concepts. Careful and objective collection of all pertinent facts is the regular procedure of business in deciding on the appropriate choice of alternatives. The grossly stereotyped nature of the thinking which went into GE's exclusion of pregnancy-related disabilities and into the insurance practice upon which GE relies, affords further support for the finding of discriminatory motivation (see Gilbert original brief, pp. 86-100).

The district court heard Thomas Hilbert, GE's Labor Relations Counsel, the only company representative called as a witness by GE, explain that GE decided where to spend benefit money on the same basis as Department of Defense, where it would "get the biggest bang for the buck" (II App. 645). The district court had before it minutes of negotiations where over the years (III, App. 1026-1028, 1036, 1037, 1041) including 1966 (III App. 1043-1044) and 1969 (III App. 1048-1049), GE had refused to discuss costs at the bargaining table because GE bargained only "level of benefits", it did only what was the "appropriate thing to do" (II App. 646-647, III App. 1036) and that it had "better uses for the money" than to pay for pregnancy-related disabilities (III App. 879). When the district court asked Hilbert why a female disabled by a latent disease which became active during pregnancy

does not get benefits, it received from Hilbert only the reply that it was because of "the language of the plan" (II App. 607).

Upon the basis of the entire record, the district court found that GE was motivated by a discriminatory attitude towards its female employees (Jt. Pet. 32a), that its discriminatory practices have "been deliberate and intentional" (Jt. Pet. 38a) and that there is "no rational distinction" between the coverage GE provides its male employees and the excluded disabilities of females (Jt. Pet. 37a). We urge that on the basis of these findings the judgment below should be affirmed leaving to the parties in future cases the burden of such further development of the law as is appropriate to their particular facts.

VI.

Adversely to Affect an Individual Because of Physiological Differences Peculiar to the Individual's Race, Sex or Religion Constitutes Prima Facie an Unlawful Employment Practice in Violation of Title VII

Proof that an employer gave blood tests to all applicants for employment and excluded those whose blood discloses a sickle cell trait would seem obviously sufficient to establish a prima facie case of discrimination because of race, since in the United States sickle cell disease affects from 7-14% of blacks but no Caucasians.[51] There is now pending in the district court in

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[51] "The disease may occur in two forms: A relatively benign form referred as a sickle cell trait; and the severe form, sickle cell anemia.

"Carriers of sickle cell trait typically do not experience ill effects from the disease except under conditions of extreme physical stress or diminished oxygen supply."

The sickle cell anemia is present in a smaller proportion of the black race although the extent is not known because there are

Louisiana a case which has been remanded by the Fifth Circuit for a determination of whether a discharge for sickle cell anemia violates Title VII.[52]

Large employers as a standard practice carefully screen all applicants for employment through medical tests designed to detect any physical defect which would make the applicant less than perfect physically. Employers seek thereby to avoid the likelihood of claims under the many fringe benefit programs—disability insurance, health and medical insurance, life insurance, workmen's compensation insurance.[53]

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no reliable statistics. Blood tests are used to determine the presence of sickle cell anemia and the sickle cell trait. Hearings on H.R. 11742 92nd Cong., etc. before the House Subcommittee on Public Health and Environment, Committee on Interstate and Foreign Commerce, 92nd Cong., 1st Sess., pp. 58, 97, November 12, 1971.

[52] *Smith* v. *Olin Mathieson Corp.*, 10 FEP Cases 62 (USWCWD La. 1974) rev'd in part and rem'd 535 F.2d 862 (5th Cir. 1976), where the district court noted that Olin Mathieson had not tested the plaintiff for sickle cell anemia either prior to or during his employment (10 FEP Cases at 63).

[53] The thoroughness of the preemployment test which GE gives all employees is evident from the preemployment medical history and physical examination forms here in evidence (Plfs. Exhs. 26 and 27, unprinted). Counsel for plaintiffs encountered the thoroughness and exclusionary character of GE's testing in settling the case of *Allen* v. *GE*, USDCED Tex. Tyler Div. Civ. Act No. 5452, which was discussed during the trial herein during the cross-examination of Hilbert, GE's Labor Counsel (II App. 632). After agreeing to hire all the plaintiffs who passed the physical examination GE reported that two black plaintiffs had been disqualified because X-rays taken by GE as part of the physical examination showed they had sacralization of the L-5 vertebrae, which means that the L-5 vertebrae was partially connected with the sacrum. Both women had worked for years without any health problems. As proof that this was not a pretext GE offered to show the plaintiffs records of 36 other applicants disqualified during the preceding year on the same basis. GE did not assert that this condition would cause any problem except that some persons with this condition found bending over difficult. Neither of these plaintiffs had any difficulty in bending and lifting.

The "grooming" cases upon which GE relies (Supp. Br. p. 13, fn. 7) assume a more serious character when the prohibition on a beard results in the loss of employment of a black because of a physiological condition peculiar to blacks which requires him to wear a beard.[54] The same district court which decided the instant case recently dismissed a suit brought under Title VII by a black employee who had a condition known as pseudofolliculitis bargae ("PFB") occurring only among the black race. His doctor prescribed a beard as a solution to the condition after a period of unsuccessful efforts to cure the condition by other means. The employee was discharged for violation of a rule prohibiting the wearing of a beard.

The impact of these practices upon the employment of blacks and Hispanics may prove to be greater than the impact of the neutral testing present in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 465 (1975).

The "lack of identity"[55] between applicants disqualified for employment and race under a policy of not hiring those with sickle cell traits, is parallel to the lack of identity between pregnancy and sex. Sickle cell trait is a race-linked trait just as pregnancy is a sex-linked trait. The legislative history of Title VII (pp. 33-34 *supra*) showing rejection of amendments to restrict discrimination to cases where race, sex, na-

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[54] *Woods* v. *Safeway Stores*, 13 FEP Cases 114 (USDCED Va. 1976).

[55] *Geduldig* v. *Aiello*, 417 U.S. 484, 496-497, fn. 20.

tionality or religion was the "sole" ground for the discrimination establishes that Congress intended to reach as discrimination "sex plus" and "race plus" discrimination. This Court's decision in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971) applied the "sex plus" principle to hold that refusal to hire women with pre-school age children discriminated because of sex in violation of Title VII. The fact that only a portion of the class female was singled out for discrimination did not prevent the finding that the discrimination was "because" of "sex" within the meaning of Section 703(a).

The discrimination because of physical characteristics either exclusively or predominantly possessed by one sex race, nationality or religion, has had a long history in the field of insurance. Laws passed in various states, beginning in the 1870s, requiring insurance companies to insure the members of the black race at the same premium rate as white, resulted in the refusal of insurance companies to insure blacks. This history has been summarized as follows:[56]

> "Colored people became a factor in insurance in the 1870's. * * * At first Prudential issued policies on colored lives at the same rates as white. The Metropolitan did likewise. * * * By 1881, however, the fact that Negro lives were subject to a much greater mortality than white had become apparent. Metropolitan stopped writing insurance on colored lives entirely at the beginning of that year. In April, the Prudential began to charge higher premium rates for colored lives to

[56] Marquis James, The Metropolitan Life, A Study in Business Growth, Viking 1947 pp. 338-339 see also pp. 86-87. Cf. Raymond V. Carpenter, An Epoch in Life Insurance—33 Years of Metropolitan (1924) p. 9.

> cover the higher mortality, and the Metropolitan resumed writing them on a similar basis in November.[69]
>
> "This action, dictated entirely by actuarial findings, was misconstrued as racial discrimination. Massachusetts passed a law forbidding the charging of higher premium rates for colored than for white. After unavailing protests the companies discontinued soliciting Negro risks in that state. When several other states followed suit with similar laws,[70] Prudential went further and stopped doing business with Negroes everywhere.
>
> "Except in states with laws of the type mentioned, Metropolitan continued writing Negroes, but at higher rates than on whites. Careful selection was deemed necessary, however, with a full medical examination in every case."

"[69] *Metropolitan Industrial Rate Book,* Form 2898, November 1943, p. 72; Hoffman, op. cit., 137.

"[70] Connecticut, 1887; Ohio, 1889; New York, 1891; Michigan, 1893; Minnesota, 1895; New Jersey, 1902; Rhode Island had such a law by 1894 but repealed it some time before 1906."

The largest black business in the world was the result of the refusal of white companies to write policies on black lives in states outlawing the use of race segregated actuarial tables.[57]

The black life expectancy has continued over the years to differ as markedly from the white expectancy

[57] Winifred Octavus Byron, Jr., Negro Life Insurance Companies: A Comparative Analysis of the Operating and Financial Experience of Negroes' Legal Reserve Life Insurance Companies, Univ. of Pa., Philadelphia, 1948, pp. 7-8, which also reviews the various state laws; Robert C. Puth, Can Black Insurance Companies Survive, Challenge, May-June 1974, p. 51, 52.

as the difference between sexes.[58] The difference in days lost from work due to disability by blacks has always been substantially higher for blacks than for whites. In our discussion of the Congressional rejection of sex averaging or race averaging, when it amended the Railroad Unemployment Insurance Act to cover disabilities, we quoted the tables showing the number of days lost from disabling illness per thousand employees which in 1942 for white males was 122.1, for females 189.3 and for blacks 244.9 (see pp. 29-31, *supra*). In 1968 the number of days lost from work by a currently employed person was 5.1 per white and 8.1 per other races.[59]

The lower federal courts have uniformly held that differences in longevity between male and female do not serve as a defense to differentiate between the sexes in benefits under retirement plans (see cases collected p. 21, fn. 19). These cases have squarely held that discrimination because of life expectancy constituted discrimination because of sex. Under GE's analysis of longevity as a physiological condition similar to pregnancy, all these cases constitute precedent for the instant case. They correctly interpret the nondiscrimination principles of Title VII as applicable to discrimination because of physiological fact linked to one sex as opposed to the other.

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[58] See fn. 4, p. 2, *supra*.

[59] U.S. Dept. of Health, Education and Welfare, Public Health Service, Vital Health Statistics, Series 10, Number 71, Time Lost from Work Among the Currently Employed Population, United States 1968, (GPO April 1972), p. 19, Table 7.

VII.

Figures Now Available from the Three Years of Experience in Covering Pregnancy-Related Disabilities Under the Hawaii Temporary Disability Insurance Law and at Xerox Corporation Show That GE's Cost Estimates Are Grossly Exaggerated and That the Increase in Cost Will Only Be a Fraction of a Cent Per Hour Per Employee

GE in its supplemental brief, pp. 17-25, relies heavily on the allegedly great increase in cost which will result from affirmance. GE asserts that the cost per unit of benefit for a female employee under GE's existing insurance coverage, where no pregnancy benefit is provided, calculated by GE's sex averaging method, is 170 percent of that for a male employee (GE Supp. Br. p. 21). GE then argues that this 170 percent figure, "would rise to 210 percent were the six weeks maternity benefit to be provided, and to 300-330 per cent were full maternity coverage to be provided" (GE Supp. Br. p. 21, fn. 16). As set forth in our first brief (Gilbert original brief, pp. 139-146), GE did not plead any issue in the district court which made cost relevant, and introduced no evidence or even estimates as to the cost to GE of covering pregnancy-related disabilities in its sickness and accident benefit program. In the district court GE attempted to defend on the basis of the statistical estimates of the cost to other companies of paying disability benefits for absences due to pregnancy-related disabilities (II App. 536-569, 737-738, III App. 846-847), instead of presenting any evidence of what GE's costs would be. Both the district court (Jt. Pet. 30a-33a) and the court of appeals (Supp. Br. Jt. Pet. 10a-11a, fn. 23) held cost immaterial. The district court also found the statistical data presented by GE "to be of too specula-

tive a nature to be probative of actual future costs" (Jt. Pet. 25a).

GE's statistical estimates were based on the stereotyped assumptions of GE's actuary Jackson (discussed pp. 71-72, *supra*) that all women would be absent the maximum time permissible under a 13 week plan, 23 weeks under a 26 week plan and 26 weeks under a 52 week plan. None of GE's figures are supported by any actual experience with respect to the length of time a woman will be absent when she is not subject to mandatory maternity leave requirements, as GE's employees had always been prior to 1973 (see Gilbert original brief, pp. 40-41). None of GE's figures are supported by any actual experience in paying benefits for pregnancy-related disabilities. We now have available facts and figures based on actual experience from two sources. We have data from Hawaii as to its experience under the amendment (Section 392-3(5), to the Hawaii Temporary Disability Insurance Law, effective May 1, 1973, requiring all employers in Hawaii to provide full coverage for pregnancy-related disabilities, which data we have printed in Appendices C-N, pp. 9a-23a, *infra*. We have the experience of Xerox Corporation for 1974 and 1975, which we print as Appendix P hereto, pp. 24a-25a, *infra,* thus updating the experience of Xerox for 1973, which we printed in Appendix S, Gilbert original brief, pp. 76a-91a.

A. Coverage of pregnancy-related disabilities under Hawaii's Temporary Disability Insurance Law has not increased costs. Some insurance companies have reduced, other raised, rates since the law became effective.

The data from Hawaii establishes that GE's figures are grossly exaggerated. In Hawaii, of the seven insurance companies which write more than 80 per cent of

the disability insurance in the state, the rates charged by three of these companies were lower in 1973 than in 1975: Pacific Insurance charged $1.42 in 1973, 64 cents in 1973 per $100 in taxable wages; First Insurance charged 73 cents in 1973, 61 cents in 1975, and Travelers Insurance charged 69 cents in 1973, 59 cents in 1975 (pp. 17a-21a, *infra*); a fourth, Pacific Guardian, started with 60 cents in 1973, raised to 61 cents in 1974 and lowered to 60 cents in 1975 (pp. 17a-18a); a fifth, Hawaiian Insurance raised rates by one cent, from 56 cents to 57 cents (pp. 17a-18a, *infra*); a sixth, Industrial Indemnity, raised rates 20 cents, from 54 to 74 cents (pp. 17a-18a, *infra*) and no data was supplied for the seventh, Hawaiian Life.[60]

The Hawaiian Insurance law provides the same maximum duration for receipt of disability benefits as does the GE plan, 26 weeks.[61] The benefit is 55%

[60] Several of the amici supporting GE make statements about an alleged substantial increase in rates in Hawaii after pregnancy-related disabilities were covered. The Brief of American Society for Personnel Administration as Amicus Curiae, p. 7, asserts that the premium rate for female employees in Hawaii was 23% higher than the male rate before the pregnancy inclusion and 142% higher after. For this statement the only source cited is the Brief Amicus Curiae of American Mutual Insurance Alliance, et al filed in *Liberty Mutual Ins. Co.* v. *Wetzel,* No. 74-1245, p. 4 which in turn cites the Reply Brief in *Geduldig,* pp. 17-18. The Reply Brief of Appellant in *Geduldig,* pp. 17-18 states that the Hartford Insurance Co. had raised its premiums in Hawaii from $4.00 to $8.76 per month after the inclusion of pregnancy. The amicus brief of Liberty Mutual filed in the instant case, p. 8, fn. 10 makes the same statement also citing only the Geduldig Reply Brief. As appears from information supplied by the Hawaiian government, the Hartford Insurance Group is not among the seven companies which write 82 percent of the disability insurance under the Hawaiian statute (pp. 16a-18a, infra).

[61] Section 392-23.

of wages or salary [62] as compared with 60% under the GE plan.

B. Xerox Corporation employees have on the average returned to work within less than eight weeks after childbirth over a three-year period.

Xerox Corporation has a temporary disability plan which pays the full salary for a period of five to six months and a long term disability plan which takes over after 6 months and pays 70% of salary for two years. The average weekly benefit paid in 1973 to women absent due to pregnancy disability was $140 per week, in 1974, $165 per week, and in 1975, $203 per week.[63]

Xerox has permitted an employee to stop work at full salary four weeks before the expected birth date without any complications if the employee's attending doctor requests that she stop work. The covered employees include saleswomen who may drive as much as 125 miles a day and technical representatives who service the Xerox machines at the customer's place of business. Only upon the filing of a claim form containing the verification and narrative of complications by the attending obstetrician can an employee stop work earlier than 4 weeks preceding the expected delivery date.[64]

The Xerox experience shows with respect to absences for pregnancy, average disability time in 1973 of 10.7 weeks, in 1974 of 12 weeks and in 1975 of 11.5 weeks. The average days before delivery were 35 in 1975, 36.9

[62] Section 392-22.

[63] These figures were derived by dividing the total cost each year by the number of claims that year (p. 26a, infra).

[64] Information supplied by Margaret Hutchinson, RN, Manager, Medical Administration, Xerox Corporation.

in 1974 and 30.7 in 1973 (p. 25a, *infra*). These figures reflect the willingness of Xerox to pay pregnant employees their full salary without requiring them to work during the month preceding the expected date of delivery. The average days after delivery were 44 in 1973, 46.8 in 1974 and 45.7 in 1975 (p. 25a, *infra*).

The above figures show that in actual experience the assumption of GE that all women will be off 13 weeks under a 13 week plan and 23 weeks under a 26 week plan was not borne out, even under a plan in which the payment of full salary removes all financial incentive to return to work.[65] Under the pressure of the usual plan, such as GE's where benefits are only 60% of regular wages, there will be an incentive for employees to return earlier.

The rate of return of females to employment following childbirth at Xerox has increased dramatically, from 46% in 1973 to 59% in 1974 to 69% in 1975 (p. 25a, *infra*).

No employer is required to be as lenient as Xerox. There is no legal requirement that pregnant women be allowed to stop work and recover pay for a period before childbirth when not disabled. Therefore we believe that the Xerox experience as to days off prior to childbirth is not relevant. The figures with respect to days off after childbirth are relevant. The Xerox experience that employees return to work within approximately seven weeks after childbirth is in accord with the findings of the district court in this case, that in the absence of complication the period of disability would be from six to eight weeks (Jt. Pet. 20a).

[65] GE's actuary Jackson testified that it was standard insurance practice to fix the benefit at a low enough fraction of regular wages to provide a financial incentive to the employee to return to work (II App. 531).

C. Providing disability benefits for pregnancy would cost GE a mere fraction of a cent per hour

GE's estimates about the astronomic increases in the cost of sickness and accident benefits of pregnancy disabilities should be read in the light of the fact that sickness and accident benefits at GE in 1972 amounted to only 1.8% of base pay (p. 31a, *infra*). An increase in the ratio of money expended in paying benefits to females as compared with males is obviously a very small increase in costs when figured within the framework of a total amount of sickness and accident constituting only 1.8% of base pay.

Although GE has never provided any figures as to what the cost to it of covering pregnancy would be, the record provides the basis for making such a calculation.

In 1970 GE employees had 3,548 pregnancies; in 1971, 2,781 (II App. 253). Taking GE's estimate of average duration of pregnancy absences as 13 weeks, which it used in the court below and which exceeds the highest average at Xerox (p. 26a, *infra*), the total cost, including the 2% correction as an added amount, would be $3,023,206, in 1971, $2,573,570. If figured on eight weeks' duration the total cost for females would have been, for 1970: $1,860,434; for 1971; $1,583,641. If figured on six weeks' duration the total cost for females would have been, for 1970: $1,396,835.76; in 1971: $1,157,308.25. Given the total sickness and accident payments to both males and females (I App. 198-199), the increase in total cost of the sickness and accident program for both male and female, figured at 13 weeks' duration for 1970, would have been 16%; for 1971, 10%; figured at 8 weeks' duration, for 1970 the increase would have been 9%; for 1971, 6%. Figured at 6 weeks' duration the increase in total cost for both males and females in 1970 would have been 7%; for 1971, 4%.

The average payment for weekly sickness and accident benefits, including the 2% correction as an added amount, for females in 1970 for 13 weeks would have been $848.02; for 8 weeks, $524.32; for 6 weeks, $393.24; in 1971, for 13 weeks, $925.34; for 8 weeks, $568,96; for 6 weeks, $427.08. Covering pregnancy-related disabilities in 1970 for 13 weeks would have cost 4/10 of a cent per hour; for 8 weeks, 2/10 cent per hour; for 6 weeks, 1/10 cent per hour. For 1971 for 13 weeks it would have been 3/10 cent per hour; for 8 weeks, 2/10 cent per hour; for 6 weeks 1/10 cent per hour.

The cost of the weekly sickness and accident program figured as an average cost per female, if the foregoing weekly benefit were figured in, would have amounted to, in 1970 for 13 weeks, $120.71; for 8 weeks, $103.29; for 6 weeks, $98.11; in 1971 for 13 weeks, $144.52; for 8 weeks, $132.41; for 6 weeks, $127.12.

These figures show that the cost of including coverage of pregnancy-related disabilities would be modest. These figures find support in the report of Kistler and McDonough of a survey of the practices of insurance companies regarding pregnancy practices both in writing policies and with respect to their own employees. They state:[66]

> "The authors conclude that introduction of paid maternity leave may represent a rational and defensible expansion of current fringe benefits programs. Cost arguments may have been over-

[66] Linda H. Kistler and Carol C. McDonough, Paid Maternity Leave-Benefits May Justify Costs, 26 Labor Law Journal 783 (December 1975).

emphasized in the past, and opportunities for cost reductions through lower labor turnover and training costs have not been fully evaluated.

"The authors believe that companies should begin serious evaluation of the cost of introducing paid maternity leave regardless of the ultimate outcome of current litigation. Perhaps an analysis of tangible benefits in the form of reduced labor turnover and intangible benefits from improved employee morale and company loyalty will convince responsible managements that paid maternity leave is both cost effective and socially responsible."

D. Nationwide estimates computed for six or eight weeks of absence came to an increased cost of $150 million and $200 million respectively.

GE introduced in evidence two nationwide cost estimates, one prepared by Paul H. Jackson (GE Exh. 42, II App. 846) and the other by Actuary Bailie (GE Exh. 13, II App. 737-738).

Bailie made estimates, assuming average duration of 20 weeks, 25 weeks and 30 weeks (II App. 737). Using Bailie's method of computation, but figuring for a duration of 6 weeks and 8 weeks respectively, would produce a total nationwide cost of $150 million and $275 million.[67]

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[67] Bailie assumed that 60% of the pregnant women already had coverage for pregnancy-related disabilities for six weeks at a cost of $225 million (I App. 737). To provide 6 weeks' coverage for pregnancy-related disabilities to the other 40% of pregnant women who are not now covered would cost 2/3 of $225 million or an additional cost of only $150 million. To provide an average benefit of 8 weeks would require 2 more weeks' coverage for the 60 percent already getting six weeks, which would come to $75 million more and 8 weeks for the remaining 40% would come to $200, or a total of $275 million additional cost nationwide.

Jackson computed only one figure which assumed that 45% of the women were under plans providing a maximum period of duration of 13 weeks and all these women would claim for the full 13 weeks; that 50% of the women were under a 26 week plan and would claim for 23 weeks; that 5% were under a 52 week plan and would claim for 30 weeks (GE Exh. No. 42 II App. 536, 546-549, 555, 846). Jackson assumed that 45% got benefits of $60 per week, 50% of $70 per week and 5% at $80 per week, or an average of $66 per week. Jackson assumed 1,463,000 births to working women of whom 40% had coverage for disability benefits. This would mean 585,200 women had coverage. He further assumed that 40% of these had coverage for pregnancy-related disabilities for 6 weeks (III App. 846). This is to be contrasted with Bailie's figure of 60% covered for 6 weeks for pregnancy-related disabilities (II App. 737). On the basis of Jackson's assumptions it would cost $139 million to provide 6 weeks' coverage for those not having it and $196 million to provide 8 weeks' coverage for all women.

Not only did Jackson assume the 13 week, 23 week and 30 week coverage durations, but he assumed that women were covered by sick leave plans which did not provide coverage for pregnancy, and estimated a $406 million dollar nationwide cost for sick leave. GE covers pregnancy-related absences under its sick leave plan, which provides sick leave on a graduated basis, beginning with one day a year for employees with one to four years' service and 5 days of sick leave a year for employees with 25 years or more (IV App. 1345). We know of no basis upon which it can be estimated how many employers cover pregnancy-related disabilities or number of days of maximum sick leave a year

available. Jackson's estimate of a cost of $406 million in sick leave pay, a figure more than half his estimated additional cost for disability benefits, seems out of line with the types of sick leave usually available.

Jackson's estimate that 5% of the women workers who give birth will claim permanent disability the rest of their lives is again without any support. The medical testimony and findings here negate any such estimate. The Social Security Administration has had so few, if any claims of permanent disability caused by childbirth or pregnancy that its statistics place such cases in the category of "other" rather than in a described diagnostic group (p. 28a, *infra*).

The district court viewed the pregnancy estimates by Bailie and Jackson as too conjectural to serve as evidence in this case (Jt. Pet. 25a). We have refigured their tables to illustrate how vastly overstated their figures are. We believe as the courts below held that costs are immaterial. Certainly if costs can ever rise to the status of a business necessity these do not (see Gilbert Original Brief p. 143). All estimates of costs by GE and its supporting amici should be disregarded.

CONCLUSION

"Pregnancy * * * constitutes the *sine qua non* of most sex stereotypes which ultimately take the form of arbitrary limitations upon all aspects of women's lives." [68] Four circuit courts have directly ruled that denial of pregnancy-related disability benefits discriminates because of sex in violation of Title VII. Three other circuits have expressed the same view,

[68] G.M. Wells, Sex Discrimination and Title VII 53 UMK-C Rev. 273-290 (Spg. 1975).

though not ruling directly on the issue. Seventeen federal district judges, the highest courts of four states and 27 state FEP agencies have held the denial to constitute prohibited discrimination because of sex (see pp. 1a-5a, *infra*).

We respectfully urge this Court to put its mandate on this vast body of decisions of such great importance to women. The judgment below should be affirmed.

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September 15, 1976

APPENDIX

APPENDIX A

List of Decisions Holding that It Constitutes Prohibited Discrimination Because of Sex To Exclude Pregnancy-Related Disabilities from an Income Disability Program, Together with a List of Law Review Comments and Conforming Collective Bargaining Agreements.

Subsequent to the original briefing numerous additional court decisions have issued, many of which were accompanied by opinions giving the issue careful and thorough analysis and upholding and applying the EEOC Sex Guidelines to require employers to maintain the income of employees disabled by pregnancy on the same basis as governs income maintenance when male employees are disabled. The count in the federal courts now stands: four circuits with holdings exactly in point[a]; three others distinguishing and holding, *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) not controlling on this issue;[b] and seventeen federal district judges with decisions squarely deciding the issue in the same way as the courts below in this case.[c] The highest courts

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[a] *Wetzel* v. *Liberty Mutual Insurance Co.,* 511 F.2d 199 (3d Cir. 1975), judgment vacated 96 S. Ct. 1202; the Fourth Circuit in the instant case; *Farkas* v. *South Western City School District,* 506 F.2d 1400 (6th Cir. 1974); *Satty* v. *Nashville Gas Co.,* 11 FEP Cases 1 (6th Cir., 1975) pet. for cert. pending No. 75-536; *Hutchison* v. *Lake Oswego School District,* 519 F.2d 961, 11 FEP Cases 161 (9th Cir. 1975), petition for cert. pending, No. 75-568; *Berg* v. *Richmond Unified School District,* 528 F.2d 1208 (9th Cir. 1975), pet. for cert. pending No. 75-1069.

[b] *Communications Workers* v. *A. T. & T.,* 513 F.2d 1024 (2d Cir. 1975), pet. for cert. pending No. 74-1601; *Tyler* v. *Vickery,* 517 F.2d 1089, 1097-1099 (5th Cir. 1975); *Holthaus* v. *Compton & Sons Inc.,* 514 F.2d 651, 10 FEP Cases 601 (8th Cir., 1975).

[c] Judge Charles M. Allen in *Rowlett* v. *Jefferson County Bd. of Ed.* (USDCWD Ky. Sept. 29, 1975) and *Polston* v. *Metropolitan Life Insurance Co.,* 7 FEP Cases 388 (WD Ky. 1975); Judge Frank Battisti in *Lillo* v. *Plymouth Local Bd. of Ed.,* 8 FEP

of four states[d] and at least 27 FEP Agencies[e] have

Cases 21 (USDCND Oh. ED 1973); Judge Roger D. Farley in *Brauer* v. *Clark County School District* (USDCD Nev., Civil DV-74-184 RDF, Dec. 2, 1975; Judge Myron Gordon in *Guse* v. *J.C. Penney Co., Inc.*, 11 EPD ¶ 10,626 (USDCED Wis. 1976); Judge Edward J. McManus in *Sale* v. *Waverly-Shell Rock Bd. of Ed.*, 9 FEP Cases 138 (DCND Ia. 1975); Judge Clarence C. Newcomer in *Zichy* v. *City of Philadelphia*, 392 F. Supp. 338, 10 FEP Cases 853 (USDCED Pa. 1975; Judge William H. Orrick in *Vineyard* v. *Hollister School District*, 8 FEP Cases 1009 (USDCND Calif. 1974); Judge John K. Regan in *Liss* v. *School District of Ladue*, 11 FEP Cases 156 USDCED Mo., 1975) and *Valiant* v. *Bristol-Myers Co.*, USDCED Mo. Case No. 74-137-C(2); Judge Carl B. Rubin in *Farkas* v. *South City Western School District*, 8 FEP Cases 288 USDCSD Oh. 1974 aff'd., 506 F.2d 1400 (6th Cir. 1974); Judge Otto R. Skopil in *Hutchison* v. *Lake Oswego School District*, 519 F.2d 961, 11 FEP Cases 161 (9th Cir. 1975), pet. for cert. pending, No. 75-568; Judge Alfonso J. Zirpoli, Jr. in *Berg* v. *Richmond Unified School District*, 528 F.2d 1208, 11 FEP Cases 1285 9th Cir. Dec. 9, 1975; Judge Orman R. Smith in *Payne* v. *Travenol Laboratories Inc.*, 12 FEP Cases 770, 782-783, 785 (USDCND Miss. 1976); Judge William T. Sweigert in *Oakland Federation of Teachers* v. *Oakland Unified School District*, 11 FEP Cases 262 (USDCND Calif., 1975; Judge Robert L. Taylor in *Satty* v. *Nashville Gas Co.*, 522 F.2d 850, 11 FEP Cases 1 (6th Cir. 1975), Judge Clure Morton in *Satty* v. *Nashville Gas Co.*, 384 F. Supp. 765, 10 FEP Cases 73 (USDCND Tenn. 1974) aff'd. 522 F. 2d 850 (6th Cir. 1975); Judge Gerald J. Weber in *Wetzel* v. *Liberty Mutual Insurance Co.*, 372 F. Supp. 1146 (W.D. Pa. 1974), aff'd. 511 F.2d 199 (3rd Cir. 1975), vacated 96 S.Ct. 1202; Judge William H. Young in *Dessenberg* v. *American Metal Forming Co.*, 8 FEP Cases 290 (USDCND Oh. 1973).

[d] *Cedar Rapids Community School District* v. *Parr*, 12 FEP Cases 54, 227 NW 2d 486 (Ia. Sup. Ct. 1975); *Black* v. *School Committee of Malden*, 310 NE 2d 330 (Mass. Supt. Jud. Ct. 1974); *Ray-O-Vac Div. of ESB Inc.* v. *Wisconsin Dept. of Industry, Labor & Human Rel.*, 236 NW 2d 209, 12 FEP Cases 64 (Wis. Sup. Ct. 1975); *Union Free School Dis. No. 6 Town of Islip* v. *NY State Human Rights Appeals Bd.*, 35 NY 2d 371, 362 NYS 2d 139, 10 FEP Cases 428 (1973); *Wis. Tel. Co.* v. *Wisconsin Dept. of Industry, Labor & Human Relations*, 6 FEP Cases 45, 68 Wis. 2d 345, 228 NW 2d 649 (1975). See also *Leechburg Area School District* v. *Pennsylvania Human Relations Commission*, 11 EPD ¶ 10,719 (Pa. Commonwealth Ct. 1975), involving leave but not sick pay where the Court stated (at p. 6990) that "pregnancy is a physical

similarly construed state fair employment practice legislation. The law review comment has been extensive and overwhelmingly supports the decision below.[f]

In cases arising under Title VII presenting discrimination because of pregnancy in a wide variety of contexts, other than, or in addition income maintenance, there are many new decisions, in all of which the courts have uniformly held that discrimination because of pregnancy is discrimination because of sex within the meaning of Section 703(a)(1): discharge[g] or denial of medical benefits to unwed mothers[h]; discharge because

disability, though naturally limited to the female sex, which may not be treated differently from other long-term physical disabilities suffered by all employees."

[e] The 24 states listed in Gilbert original Brief pp. 4a-10a, plus Florida, Ohio and Vermont whose position in this respect appears in the amicus briefs they filed in *Wetzel* v. *Liberty Mutual* 96 S. Ct. 1202 (1976).

[f] Comment: Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination, 75 Columbia Law Rev. 440, 456-461 (1975); Eve Cary, Pregnancy Without Penalty, 1 Civ. Lib. Rev. 31 (1974); Comment: Pregnancy Disability Benefits Under State-Administered Insurance Programs, 24 Catholic Univ. Law. Rev. 263 (1973); G.M. Wells, Sex Discrimination and Title VII, 43 Univ. Mo.-K.C. Law Rev. 273 (1975); Comment: The Impact of *Geduldig* v. *Aiello* in EEOC Guidelines on Sex Discrimination, 50 Indiana Law Journal 592 (1975); Katherine T. Bartlett, Pregnancy and the Constitution: The Uniqueness Trap, 62 Calif. Law Rev. 1532 (1974) Comment, Waiting for the Other Shoe—Wetzel and Gilbert in the Sup. Ct., 25 Emory Law Journal 125 (1976); Comment, Liberty Mutual Ins. Co. v. Wetzel: New Rights for Pregnant Workers?, 11 New England Law Rev. 225 (1975); Linda H. Kinstler and Carol C. McDonough, Paid Maternity Leave—Benefits May Justify the Cost, 26 Labor Law Journal 782 (1975): 3 Hofstra Law Rev. 141 (1975); 1975 Brigham Young Law Rev. 171 (1975).

[g] *Doe* v. *Osteopathic Hospital of Wichita, Inc.*, 333 F.Supp. 1357, 3 FEP Cases 1128 (USDC D Kans. 1971); Oakland Federation of Teachers, supra, fn. c.

[h] *Guse* v. *J.C. Penney Co. Inc.*, 12 FEP Cases 9 USDCED Wis. 1976).

of pregnancy,[i] loss of seniority,[j] mandatory unpaid leave[k], and medical benefits for pregnancy-related disabilities lower than medical benefits for other conditions.[l] Arbitrators also have been issuing decisions applying the EEOC Guidelines to require that disabilities arising out of pregnancy receive income maintenance on the same basis as other disabilities.[m]

Employers increasingly are voluntarily entering into collective bargaining agreements with unions providing

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[i] *Holthaus, supra,* fn. b; *Satty, supra,* fn. e; *Air Line Stewards and Stewardesses Assn., Local 550, TWU, AFL-CIO, et al.,* v. *American Airlines, Inc.,* 12 FEP Cases 1463 (USDCND Ill. 1976); *Mitchell* v. *Board of Trustees of Pickens County School District,* 12 FEP Cases 169 (USDCSC 1976).

[j] *Burwell* v. *Eastern Air Lines, Inc.,* 10 FEP Cases 882 (USDC ED Va. 1975), 394 F.Supp 1361; *Oakland Federation of Teachers, supra,* fn c.

[k] *Singer* v. *Mahoning County Bd. of Mental Retardation,* 379 F. Supp. 986, 8 FEP Cases 489 (USDCND Oh. 1974).

[l] *Guse* v. *J. C. Penney Co. Inc.,* 409 F. Supp. 28, 12 FEP Cases 9 (USDCED Wis. 1976).

[m] *Pacific Gas & Electric Co.,* 65 LA 504 (Adolph M. Koven, arbitrator, 1975); *Kaiser-Permanent Medical Care Program,* 64 LA 245, 248 (Daniel J. Dykstra, arbitrator, 1975); *Walled Lake Consolidated Schools,* 64 LA 239 (James R. McCormick, arbitrator, 1974); *Chippewa-Valley Bd. of Ed.,* 62 LA 409 (James R. McCormick, arbitrator, 1974); *Clio Education Assn.,* 61 LA 37 (James R. McCormick, arbitrator, 1973); Goodyear Tire & Rubber Co. (award printed in Stone and Baderschneider, Arbitration of Discrimination Grievances, Am. Arb. Assn. 1974, p. 84, enf'd *sub. nom. Goodyear Tire & Rubber Co.* v. *Rubber Workers Local,* 200, 6 FEP Cases 1069 (Oh. Ct. App. 1974), aff'd 8 FEP Cases 128 (1975) (Oh. Sup. Ct. 1975), 10 FEP Cases 1351, 42 Oh. St. 2d 516, 330, 7 EPD ¶ 9073. See also *Georgia Pacific Corp.,* 206 AAA 4 (John F. Sembower, 1976); *Thornapple-Kellogg School District,* 60 LA 549 (M. David Keefe, arbitrator 1973); *Featherlite Mfg. Arkansas Inc.,* 53 LA 18 (J. Fred Holly, arbitrator 1969).

coverage of income maintenance for pregnancy-related disabilities on the same basis as for other disabilities.[n]

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[n] IUE, the union plaintiff in this case, has such contracts under the following employers with plans with 26 weeks' maximum duration: Heekin Can. Div. of Diamond International & Local 729; Wilco Corp. of Indianapolis, Ind. and Local 815; Wagner Electric Corp. and Local 1104; General Industries, Forrest City, Ark., and Local 1148, $70 per week, Central Industries, Lawrenceville, Ill.; TRW, Inc., Philadelphia Pa.; plans with 13 weeks' maximum duration with weekly benefit as indicated: Airco Speer Carbon Graphite, St. Mary's, Pa. ($55 but not in excess of 70% average weekly earnings); Chromalloy Corp., Midwest City, Okla, (60) Torch Tip, Pittsburgh, Pa.; Cooperative Services, Inc., Detroit, Mich., ($70 to $130); Duncan Electric Co., Lafayette, Ind. ($35 to $50); and ITT Electrical Optical Products Division, Roanoke, Va. ($50); KIRC Burlington Div. of TRW Electronics Group, Burlington, Ia. (50% of straight time wages but not less than $50 per week).

APPENDIX B

Excerpts from Testimony of Elizabeth M. Casey, Vice President, Marsh and McLennon Inc., During Hearings on OFCC Sex Discrimination Guidelines, Section 60-20.3(c), September 9, 1974.

Pages 11, lines 1-9:

STATEMENT OF ELIZABETH M. CASEY,
VICE PRESIDENT, MARCH AND
MCLENNAN, INC.

Ms. CASEY: Good morning. I am Elizabeth Casey and I am an attorney from the Boston office of March & McLennan, Inc., a firm of consulting actuaries and insurance brokers. Marsh & McLennan is the actuary for several thousand pension plans throughout the country, covering well over a million employees.

Page 22, lines 10-23:

Ms. CASEY: Except for the first example that I gave you where the benefit would be based on putting in so much money each year, and buying what it would buy, which is very rare now, almost every pension plan is just based on giving the person the benefit of whatever it costs, based on salary or flat amounts. Everybody is going to get $200 a month or $3.00 for each year of service. So just about 95 percent, I would say, of all the plans in the country, men and women get the same benefits, regardless of cost.

MR. STEELE: You are saying then the general rule is equal benefits, men and women do get the same?

Ms. CASEY: The general rule is equal benefits. Men and women do get the same. There are just so few of the other types of plans around.

Page 23, line 11 to page 24, line 4:

Ms. SPINDLER: I guess I still don't understand the 95 percent figure very much. Does that 95 percent figure mean that women and men in 95 percent of the pension plans receive the same monthly benefits? Are you saying that the benefits are over so many more years?

Ms. CASEY: Before, I said the same monthly. I am saying they receive a pension based on the same formula, say half of their final earning.

Ms. SPINDLER: How many would you say receive the same exact monthly benefits?

Ms. CASEY: Oh, I have no idea. Almost all pensions are based on earnings.

MRS. RUBIN: When you are talking about the 95 percent getting the same benefits, you are talking, are you not, about the normal benefit and normal retirement date? Isn't that what you are talking about?

Ms. CASEY: Yes. When I say the same benefits,

Page 25, line 1 to p. 26, line 7:

Ms. CLAUS: Let me clarify Mrs. Rubin's and Ms. Spindler's questions to you. Do I understand you to be testifying that most plans do provide monthly benefits based on earnings and years of service, number one, most plans do that—and, number two, that would mean that if a man and woman had the same earnings and the same years of service, that under most plans today there would be equal monthly benefits?

Ms. CASEY: Yes. They don't really have a choice not to do that. Under the Internal Revenue Service

there is a code where the employer gets a deduction, and all of the plans must be honored on a non-discriminatory basis.

Ms. CLAUS: Then the only exception would be a money purchase plan?

Ms. CASEY: Right.

Ms. CLAUS: Is there some economic reason why some employers would have to use the money purchase plan as opposed to formula benefit plans?

Is there any reason why your clients could not switch from one form of plan to the other?

Ms. CASEY: Not that I know of.

Ms. CLAUS: Also, to follow up on one of Mr. Steele's and Mrs. Rubin's questions, do you know from your own experience that most insurance policies provide equal benefits for men and women, life insurance?

Ms. CASEY: I am not sure I know what your question is. When you say policies, do you mean if a company had a plan providing life insurance for employèes, would they have to be the same for males and females?

Ms. CLAUS: Yes.

Ms. CASEY: They do now. I think in the past they did not, until this law changed.

APPENDIX C

Letter received in response to form letter printed Gilbert original brief, pp. 47a-48a

George R. Ariyoshi
Governor

Joshua C. Agsalud
Director

Robert C. Gilkey
Deputy Director

Orlando K. Watanabe
Administrator

STATE OF HAWAII

DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION

825 MILILANI STREET
P. O. BOX 3769
HONOLULU, HAWAII 96812

November 11, 1975

Ms. Ruth Weyand
Attorney
International Union of Electrical,
Radio and Machine Workers
AFL-CIO and CLC
1126 16th Street, N. W.
Washington, D. C. 20036

Dear Ms. Weyand:

This is in response to your October 28, 1975 letter relating to questions of income maintenance for female employees disabled by pregnancy or childbirth.

Section 392-3(5) of the Hawaii Temporary Disability Insurance (TDI) Law defines disability as "total inability of an employee to perform the duties of his employment caused by sickness, *pregnancy, termination of pregnancy*, or accident other than a work injury as

defined in section 386-3 (underscoring added)." Hence, all employers subject to the TDI Law are required to pay TDI benefits to women who become disabled because of pregnancy or complication resulting from pregnancy as long as they meet the eligibility requirements of sections 392-25 and 392-26 (see enclosed lawbook). This no doubt will answer the three questions you raised in your letter.

If you have any other questions or desire further clarification regarding our pregnancy provision, please let us know.

Very truly yours,

/s/ JOSHUA C. AGSALUD
Joshua C. Agsalud, Director
Labor and Industrial Relations

Enc.

APPENDIX D

August 16, 1976

Mr. Orlando K. Watanabe
Administrator
Disability Compensation Division
825 Mililani Street, Room 201
Honolulu, Hawaii 96813

Re: General Electric Co. v. International Union of Electrical, Radio and Machine Workers, AFL-CIO, ea al.—
U.S. Supreme Ct. Case Nos. 74-589, 74-590

Dear Mr. Watanabe:

I am working with counsel for the Union in the above-entitled cases concerning the obligation of the employer to pay sickness and accident benefits to all female employees disabled by pregnancy or childbirth.

We are seeking the following information:

1. The name of all insurance companies which write coverage for purposes of the Hawaii TDI law, and the percentage of insurance coverage written by each; and

2. The number of pregnancy claims paid, and the percentage they constitute numerically, and by cost, of all claims paid.

We shall greatly appreciate your cooperation in supplying us with the foregoing information, to the extent that you have it.

Very truly yours,

/s/ BENJAMIN C. SIGAL

BCS:ih

APPENDIX E

George R. Ariyoshi
Governor

Joshua C. Agsalud
Director

Robert C. Gilkey
Deputy Director

Orlando K. Watanabe
Administrator

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
825 MILILANI STREET
P. O. BOX 3769
HONOLULU, HAWAII 96812

August 17, 1976

Mr. Benjamin C. Sigal
Shim, Sigal, Tam & Naito
Ste 800, 333 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Sigal:

Attached are one copy each of 45 insurance carriers authorized to write temporary disability insurance in Hawaii, and data on TDI contributions and benefits paid during calendar years 1970 to 1975 inclusive.

We do not have a breakdown of pregnancy benefits. As you know, our law considers pregnancy as any other disability effective May 8, 1973.

Very truly yours,

/s/ ORLANDO K. WATANABE
Orlando K. Watanabe
Administrator

OKW/cy
Att.

APPENDIX F

Insurance companies authorized to write temporary disability insurance in Hawaii

[Data supplied by Orlando K. Watanabe, Administrator, Disability Compensation Division, Department of Labor and Industrial Relations, Hawaii]

Aetna Life Insurance Co.
Bankers Life Co.
Cal-Farm Life Insurance Co.
Connecticut General Life Insurance Co.
Continental Assurance Co.
Employer's Insurance of Wausau
First Insurance Co. of Hawaii, Ltd.
General American Life Insurance Co.
Hawaiian Insurance Companies
Hawaiian Life Insurance Co., Ltd.
Hartford Insurance Group
Industrial Indemnity Co.
Insurance Company of North America
John Hancock Mutual Life Insurance Co.
Liberty Life Assurance Company of Boston
Lumberman's Mutual Casualty Co.
Massachusetts Mutual Life Insurance Co.
Metropolitan Life Insurance Co.
New England Mutual Life Insurance Co.
North American Co. for Life & Health
New York Life Insurance Co.

Occidental Life Insurance Co. of California
Pacific Guardian Life Insurance Co.
Pacific Insurance Co., Ltd.
The Equitable Life Assurance Society of the U.S.
The Mutual Benefit Life Insurance Co.
The Prudential Insurance Co. of America
The St. Paul Insurance Companies
Travelers Insurance Company
United Benefit Life Insurance Co.
West Coast Life Insurance Co.
Bankers National Life Insurance Co.
Crown Life Insurance Co.
Industrial Insurance Co. of Hawaii, Ltd.
Allstate Insurance Co.
Union Mutual Life Insurance Co.
Paul Revere Life Insurance Co.
Republic National Life Insurance Co.
Washington National Insurance Co.
Provident Life & Accident Insurance Co.
Northwestern National Life Insurance Co.
Central National Life Insurance Co. of Omaha
Old Security Life Insurance Co.
The Mutual Life Insurance Co. of New York
Pacific Mutual Life Insurance Co.

APPENDIX G

Data on contributions and benefits paid during calendar years 1970 to 1975 inclusive under Hawaii Temporary Disability (TDI) Law.

[Data supplied by Orlando K. Watanobe]

TDI Contributions and Benefits Paid Experience
CY 1970-75 Inclusive

Based on Annual Reports Submitted by Employers and Insurance Carrier

	1	2	3	4	5	6
	1970	1971	1972	1973	1974	*1975
Total Contributions	4,630,132	5,577,230	6,138,519	6,702,457	7,436,755	4,977,520
Employer Share	3,715,730	4,569,827	4,626,694	5,155,308	6,077,854	4,344,564
Employee Share	914,402	1,007,403	1,511,825	1,547,149	1,358,901	632,956
Total Benefits Paid	1,171,148	1,823,237	2,242,883	2,454,532	3,877,455	3,164,893
Ins. Cos. Retained	3,452,984	3,753,993	3,095,636	4,247,925	3,558,854	1,812,627
No. Persons Paid	3,474	6,752	5,860	6,332	8,954	9,054
No. Weeks Paid	22,783	31,424	36,268	44,679	52,871	45,107
Ave. Total Benefits Paid Each Person	337.12	270.02	382.74	384.64	433.04	349.56
Ave. Weekly Ben.	51.40	58.02	61.84	54.94	73.34	70.16
Ave. Duration	6.6	4.7	6.2	7.1	5.9	5.0

*Based on about 75% of annual reports.

APPENDIX H

August 26, 1976

Mr. Orlando K. Watanabe
Administrator
Disability Compensation Division
825 Mililani Street, Room 201
Honolulu, Hawaii 96813

Dear Mr. Watanabe:

Thank you for your letter of August 17, 1976.

Enclosed herewith is a copy of four pages of a brief filed in the U.S. Supreme Court in the case of *Geduldig* v. *Aiello*, No. 73-640, which include some statements we wish to check out.

First, it states that the following insurance Companies have at least 90% of the TDI business in Hawaii:

> "Travelers Insurance Company, Industrial Indemnity Insurance Company, Pacific Insurance Company, Pacific Guardian Insurance Company, First Insurance of Hawaii, and Hawaii Insurance and Guarantee Company.

What is the exact percentage of TDI business in Hawaii these companies have at the present time?

Second, it states that only one of these companies, Industrial Indemnity, has raised its rates *at all* as a result of the amendment of May 8, 1973, requiring the inclusion of disabilities arising from normal pregnancy and childbirth. What are the facts on this point at the present time?

Your consideration is greatly appreciated.

Very truly yours,

BENJAMIN C. SIGAL

BCS:ih
encl.

APPENDIX I

George R. Ariyoshi
Governor

Joshua C. Agsalud
Director

Robert C. Gilkey
Deputy Director

Orlando K. Watanabe
Administrator

STATE OF HAWAII
DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS
DISABILITY COMPENSATION DIVISION
825 MILILANI STREET
P. O. BOX 3769
HONOLULU, HAWAII 96812

September 1, 1976

Benjamin C. Sigal, Esq.
Shim, Sigal, Tam & Naito
A Law Corporation
Ste 800, 333 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Sigal:

Re: Temporary Disability Insurance Experience

In response to your letter of August 26, 1976, the TDI experience of the six insurance companies named in your letter plus Hawaiian Life is as follows:

1973 - 86.3%
1974 - 87.1%
1975 - 82.9%

With respect to the rates charged by the six named carriers, since different rates are charged to different employers, a composite rate of each company and by male-female breakdown was obtained by dividing the

total contributions paid by employers and employees by (taxable wages ÷ 100). Information is attached.

The above information was obtained from annual reports filed by TDI carriers.

Very truly yours,

/s/ ORLANDO K. WATANABE
Orlando K. Watanabe
Administrator

SS/cy
Att.

APPENDIX J

Average rates charged by six insurance companies writing the majority of disability insurance in Hawaii, 1973-1975, under Hawaii Temporary Disability Insurance (TDI) Law.

[Data supplied by Orlando K. Watanabe]

RATES CHARGED PER $100 IN TAXABLE WAGES:

	1975	1974	1973
First Insurance	$.61	$.71	$.73
Male	.55	.73	.73
Female	.68	.69	.70
Hawaiian Insurance & Guaranty	.57	.57	.56
Male	.55	.55	.56
Female	.59	.60	.56
Industrial Indemnity	.74	.55	.54
Male	.71	.54	.52
Female	.77	.57	.58
Pacific Guardian	.60	.61	.60
Male	.59	.61	.59
Female	.61	.61	.62
Pacific Insurance	.64	.95	1.42
Male	.61	.94	1.22
Female	.67	.96	1.71
Travelers Insurance	.59	.62	.69
Male	.56	.61	.65
Female	.65	.65	.76

APPENDIX K

FIRST INSURANCE COMPANY OF HAWAII, LTD.

January 8, 1976

Mr. Ben C. Sigal, Attorney
333 Queen Street
Suite 800
Honolulu, Hawaii 96813

Dear Mr. Sigal:

This letter will confirm the fact that First Insurance Co.'s TDI rates were not increased because of the fact that pregnancies are now a covered disability.

If we can of further service, please call.

Warm regards,

/s/ IVAN H. MIYAMOTO
Ivan H. Miyamoto,
Superintendent
Health Insurance Department

IHM:lh

APPENDIX L

FIRST INSURANCE COMPANY OF HAWAII, LTD.

January 13, 1976

Benjamin Sigal
333 Queen Street Suite 800
Honolulu, Hawaii 96813

Dear Mr. Sigal:

On January 1, 1975 the Temporary Disability Insurance Department lowered it's rate to become more competitive with other insurers. The rate reduction applied to both male and female, but the proportionate rate reduction for each sex is unknown.

Sincerely,

/s/ NOBUO KIWADA
Nobuo Kiwada
Temporary Disability
Insurance

APPENDIX M

PACIFIC INSURANCE COMPANY, LIMITED

Joseph E. Maxfield
Vice President

841 Bishop Street
P.O. Box 1140
Honolulu, Hawaii 96807
Telephone: 546-7283

January 12, 1976

Mr. Benjamin C. Sigal
333 Queen Street
Honolulu, Hawaii 96813

Dear Mr. Sigal:

You recently inquired as to whether we increased our TDI rates as of the date that maternity benefits became a part of the TDI law (maternity benefits became effective May 8, 1973). At that time no change in rates took place; however, we did amend our rates upward effective January 1, 1975 as the result of poor overall loss experience during the previous year.

Very truly yours,

/s/ JOSEPH E. MAXFIELD

JEM/dls

APPENDIX N

THE TRAVELERS

Group Department
Underwriting Division

January 27, 1976

International Union of Electrical,
Radio and Machine Workers
AFL-CIO
1126 16th St. N.W.
Washington, D.C. 20036

Re: Hawaii Temporary Disability Insurance

Dear Ms. Weyand:

In response to your inquiry date January 9, 1976, please be advised that there has been no increase in our TDI rates since 1970.

Should you have any further questions, please let me know.

Very truly yours,

/s/ REBECCA B. MORTLOCK
(Mrs.) Rebecca B. Mortlock
Assistant Underwriter
Group Underwriting
Division

APPENDIX O

XEROX

September 2, 1976

Mrs. Ruth Weyand
Attorney At Law
1126 16th Street, N.W.
Washington, D.C. 20036

Dear Mrs. Weyand:

As a follow-up on our telephone conversation, a copy of my April 9, 1976 Pregnancy Disability Comparison report to my Medical Director is enclosed. As you can see it is much less detailed than our 1973 report was.

I am looking forward to reading the brief you prepared in the Gilbert vs. General Electric case in which you used our 1973 report.

Please feel free to call me if you have any questions about the report.

Sincerely,

/s/ MARGARET HUTCHINSON
Margaret Hutchinson, R.N.
Manager
Medical Administration

Encl.

APPENDIX P

Pregnancy disability—time duration and disability cost—1973-1975—Xerox Corporation

INTERNAL MEMO

To
Craig Wright, M.D.

From
Margaret Hutchinson, R.N.
Manager Medical Administration
Xerox Square 003
Extension 33306

Subject
PREGNANCY DISABILITY EXPERIENCE COMPARISON

Date
April 9, 1976

	1973	1974	1975
Claims closed	178	209	244
Average claims per month	14.8	17.4	20.3
Disability days—average	74.8 (10.7 weeks)	83.7 (12 weeks)	80.7 (11.5 weeks)
Average days before delivery	30.7	36.9	35.0
Average days after delivery	44.0	46.8	45.7
Average cost per claim	$1,544	$2,117	$2,374
Total claims cost	$274,830	$442,469	$579,252
Number returned to work	82	123	168
% of total claims returned to work	46%	59%	69%
Number terminated employment	96	86	76
% of total claims terminated employment	54%	41%	31%
Dollar Increase per Claim is		$573	$257
Total Dollar Claim Increase is		$167,639	$136,783

Year	PM's	Non-Exempt Field Clerical 9	Non-Exempt Tech Rep. 7	Field Exempt 5	Rochester Exempt 3	Rochester Clerical Non-Exempt 2		Total
1975		164	0	19	9	52	=	244
1974		107	1	5	12	84	=	209
1973		83	0	0	1	94	=	178

APPENDIX Q

Social Security Disability Experience—graduated recovery termination rates for disability beneficiaries by sex, 1973-1974, unpublished data supplied by Office of the Actuary, Social Security Administration, September 9, 1976.

GRADUATED RECOVERY TERMINATION RATES FOR OASDI MALE DISABILITY BENEFICIARIES, 1963-74
(Per Thousand)

Calendar age [1] at Entitlement X [3]	$Q_{(X)}$ [2,4]	$Q_{(X)+1}$	$Q_{(X)+2}$	$Q_{(X)+3}$	$Q_{(X)+4}$	$Q_{(X)+5}$
50	20.1	40.4	17.3	8.5	4.7	2.3
51	17.6	36.2	15.0	7.4	4.1	2.1
52	15.5	32.2	12.9	6.4	3.6	1.8
53	13.5	28.6	11.1	5.5	3.2	1.7
54	11.7	25.2	9.6	4.9	2.8	1.5
55	10.0	22.0	8.3	4.3	2.5	1.5
56	8.5	19.1	7.2	3.8	2.4	1.4
57	7.3	16.7	6.5	3.5	2.3	1.4
58	6.1	14.5	5.9	3.2	2.3	1.4
59	5.0	12.7	5.5	3.1	2.2	1.3
60	4.1	11.2	5.1	3.1	2.2	—
61	3.2	10.1	5.0	3.0	—	—
62	2.5	9.5	5.0	—	—	—
63	2.0	9.0	—	—	—	—
64	1.7	—	—	—	—	—

GRADUATED DEATH TERMINATION RATES FOR OASDI FEMALE DISABILITY BENEFICIARIES, 1963-74
(Per Thousand)

Calendar age [1] at Entitlement X [3]	$Q_{(X)}$ [2,4]	$Q_{(X)+1}$	$Q_{(X)+2}$	$Q_{(X)+3}$	$Q_{(X)+4}$	$Q_{(X)+5}$
50	63.4	47.4	35.7	29.9	28.3	23.4
51	63.4	47.5	36.1	30.7	29.1	29.0
52	63.3	47.6	36.5	31.6	30.1	29.8
53	63.2	47.7	37.7	32.6	31.1	30.3
54	62.9	47.6	37.4	33.4	32.3	32.0
55	62.3	47.5	37.7	34.2	33.4	33.3
56	61.3	47.2	37.9	35.0	34.5	34.8
57	60.1	46.8	38.2	35.7	35.4	36.2
58	58.8	45.6	38.6	36.3	36.1	37.2
59	57.8	46.5	39.1	36.6	36.4	37.4
60	57.6	46.8	39.7	36.9	36.4	—
61	58.5	47.8	40.5	37.7	—	—
62	60.9	49.5	41.5	—	—	—
63	64.0	51.5	—	—	—	—
64	57.8	—	—	—	—	—

[1] Calendar age is secured by taking the calendar year of disability and subtracting the calendar year of birth. The calendar age on the average will be a half a year higher than actual age.

[2] Q represents probability of termination.

[3] X represents calendar age.

[4] X in parenthesis means age at beginning of entitlement, which is 6.5 months after beginning of disability irrespective of when the award is made or when payments begin to be received.

APPENDIX R

TABLE 122.—*Worker disability awards during year: Number and percentage distribution, by diagnostic group, age, and race, 1972.*[*]

Diagnostic group	Total	Age attained during year						Race		
		Under 20	20-29	30-44	45-49	50-54	55-59	60 and over	White	Black	Other
	Number										
Total	455,308	24,285	32,208	26,772	44,598	72,943	112,982	141,609	387,638	62,635	5,125
Infective and parasitic	8,627	644	1,094	900	1,230	1,554	1,899	1,606	5,800	2,603	224
Neoplasms	43,667	1,394	2,322	2,267	4,785	7,612	11,965	13,302	28,646	4,680	341
Endocrine, nutritional, and metabolic	17,352	843	935	763	1,746	3,063	4,397	8,885	13,784	3,243	325
Blood and blood-forming organs	1,155	138	164	78	128	170	154	303	716	415	24
Mental disorders	45,253	7,920	7,034	4,680	5,624	6,275	7,255	6,455	37,881	6,736	616
Nervous system and sense organs	28,216	2,715	3,132	2,300	2,606	4,221	6,191	7,151	24,233	3,653	328
Circulatory system	165,684	902	3,772	6,051	12,791	24,811	41,226	57,131	124,068	21,249	1,367
Respiratory system	33,038	95	847	787	2,114	5,066	10,375	14,054	30,226	2,659	153
Digestive system	13,369	358	789	1,058	1,802	2,413	3,383	3,566	11,636	1,589	104
Genitourinary system	4,304	375	576	290	480	653	815	1,115	3,301	943	60
Skin and subcutaneous tissue	1,766	142	194	99	217	285	384	435	1,403	316	37
Musculoskeletal system	75,923	2,302	6,144	4,811	7,143	12,269	19,525	23,729	64,802	10,022	1,079
Congenital anomalies	4,033	471	695	305	512	861	772	717	3,584	423	26
Accidents	31,723	6,253	4,771	2,462	3,265	3,913	4,866	6,098	27,171	4,122	435
Other	293	6	19	21	55	57	75	60	245	42	6
	Percentage distribution										
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Infective and parasitic	1.9	2.7	3.4	3.4	2.8	2.1	1.4	1.1	1.5	4.2	4.4
Neoplasms	9.6	5.7	7.3	8.5	10.7	10.4	10.6	9.4	10.0	7.5	6.7
Endocrine, nutritional, and metabolic	3.8	2.2	2.9	2.8	3.9	4.2	3.9	4.2	3.6	6.2	6.3
Blood and blood-forming organs	.3	.7	.5	.3	.3	.2	.1	.2	.2	.7	.5
Mental disorders	9.9	32.7	21.8	17.5	12.6	8.6	6.4	4.6	9.8	10.8	12.0
Nervous system and sense organs	6.2	11.2	9.7	6.2	5.8	5.8	5.5	5.0	6.3	5.8	6.0
Circulatory system	32.2	3.7	11.7	22.6	26.7	34.0	36.5	40.3	32.0	33.9	26.7
Respiratory system	7.3	.4	1.7	2.9	4.7	6.9	9.2	9.9	7.8	4.2	3.0
Digestive system	2.9	1.5	2.4	4.0	4.0	3.3	3.0	2.5	3.0	2.4	3.2
Genitourinary system	.9	1.5	1.8	1.1	1.1	1.1	.7	.8	.9	1.5	1.2
Skin and subcutaneous tissue	.4	.6	.6	.4	.5	.8	.3	.3	.4	.3	.7
Musculoskeletal system	16.7	9.5	19.1	18.0	16.0	16.8	17.3	16.8	18.7	16.0	20.3
Congenital anomalies	.9	1.9	2.2	1.1	1.1	.8	.7	.7	.9	.7	.5
Accidents	7.0	25.7	14.8	8.2	7.5	5.4	4.3	4.3	7.0	6.6	8.5
Other	.1	0	.1	.1	.1	.1	.1	0	.1	.2	.1

[*] U.S. Dept. Health, Education and Welfare, Social Security Administration, Social Security Bulletin, Annual Statistical Supplement, 1974, p. 149.

APPENDIX S

TABLE 123.—*Worker disability awards during year: Number and percentage distribution, by occupational division, sex, and race, 1972..*[*]

Occupational division	Sex			Race		
	Total	Men	Women	White	Black	Other
	Number					
Total	455,308	329,720	125,678	387,638	62,635	5,125
Professional, technical, and managerial	51,389	36,394	14,995	48,719	2,350	320
Professional and technical	28,575	17,007	11,568	27,030	1,370	175
Managerial	22,814	19,387	3,427	21,689	980	145
Clerical and sales	61,151	27,926	33,225	57,665	3,072	414
Clerical	37,825	12,490	25,335	35,242	2,317	266
Sales	23,326	15,436	7,890	22,423	755	148
Service	71,030	33,381	37,669	60,559	19,397	1,074
Domestic	7,948	497	7,451	2,724	5,177	47
Food and beverage	22,639	9,220	31,419	18,258	3,957	424
Apparel and furnishings	5,452	1,924	3,528	3,307	2,086	59
Police, fire, and military	10,020	9,668	352	8,797	1,006	217
Building maintenance	10,276	8,044	2,232	6,209	3,928	139
Other	14,695	4,008	10,687	11,264	3,243	188
Farming	21,500	20,347	1,153	17,817	3,004	679
Processing	14,977	12,191	2,786	11,941	2,892	144
Machine trades	43,496	36,396	7,100	39,657	3,507	332
Bench work	28,980	13,395	15,585	25,814	2,788	378
Structural work	61,588	60,539	1,049	52,931	7,970	687
Miscellaneous	56,152	51,729	4,423	46,451	9,082	619
Transportation	28,329	27,779	550	23,296	4,765	268
Packaging and handling	16,824	13,486	3,338	13,189	3,351	284
Mineral extraction	5,680	5,626	54	5,395	260	25
Other	5,319	4,838	481	4,571	706	42
Unknown	45,135	37,442	7,693	36,084	8,573	478
	Percentage distribution[1]					
Total	100.0	100.0	100.0	100.0	100.0	100.0
Professional, technical, and managerial	12.5	12.5	12.7	13.9	4.3	6.9
Professional and technical	7.0	5.8	9.8	7.7	2.5	3.8
Managerial	5.6	6.6	2.9	6.2	1.8	3.1
Clerical and sales	14.9	9.6	28.2	16.4	5.7	8.9
Clerical	9.2	4.3	21.5	10.0	4.3	5.7
Sales	5.7	5.3	6.7	6.4	1.4	3.2
Service	17.3	11.4	31.9	14.4	35.9	23.1
Domestic	1.9	.2	6.3	.8	9.6	1.0
Food and beverage	5.5	3.2	11.4	5.2	7.3	9.1
Apparel and furnishings	1.3	.7	3.0	.9	3.9	1.3
Police, fire, and military	2.4	3.3	.3	2.5	1.9	4.7
Building maintenance	2.5	2.8	1.9	1.8	7.3	3.0
Other	3.6	1.4	9.1	3.2	6.0	4.0
Farming	5.2	7.0	1.0	5.1	5.6	14.6
Processing	3.7	4.2	2.4	3.4	5.3	3.1
Machine trades	10.6	12.5	6.0	11.3	6.5	7.1
Bench work	7.1	4.6	13.2	7.3	5.2	8.1
Structural work	15.0	20.7	.9	15.1	14.7	14.8
Miscellaneous	13.7	17.7	3.7	13.2	16.8	13.3
Transportation	6.9	9.5	.5	6.6	8.8	5.8
Packaging and handling	4.1	4.6	2.8	3.8	6.2	6.1
Mineral extraction	1.4	1.9	0	1.5	.5	.6
Other	1.3	1.7	.4	1.3	1.3	.9

[1] Excludes workers whose occupational status was unknown.

[*] U. S. Dept. Health, Education and Welfare, Social Security Bulletin, Annual Statistical Supplement, 1974, p. 150.

APPENDIX T

TABLE 124.—*Worker disability awards during year: Number and percentage distribution, by age on birthday in year of onset of disability and by sex, 1972.**

Age in year of onset of disability	Number			Percentage distribution		
	Total	Men	Women	Total	Men	Women
Total ...	455,398	329,720	125,678	100.0	100.0	100.0
Under 25 ..	19,680	15,129	4,551	4.3	4.6	3.6
25-29	10,959	8,109	2,850	2.4	2.5	2.3
30-34	14,678	11,012	3,666	3.2	3.3	2.0
35-39	19,882	15,175	4,707	4.4	4.6	3.7
40-44	29,775	21,589	8,186	6.5	6.5	6.5
45-49	49,437	34,627	14,810	10.9	10.5	11.8
50-54	77,819	53,264	24,555	17.1	16.2	19.5
55-59	121,540	85,924	35,616	26.7	26.1	28.3
60-65	111,628	84,891	26,737	24.5	25.7	21.3

* U. S. Dept. Health, Education and Welfare, Social Security Administration, Social Security Bulletin, Annual Statistical Supplement, 1974, p. 151.

APPENDIX U

Fringe benefits as percentage of total labor cost—General Electric, 1972—employees represented by IUE—data supplied to IUE May 1973 in response to IUE request.

BASE YEAR BENEFIT EXPENDITURES
HOURLY AND SALARIED TANDEM REPRESENTED UNIT

Included Benefits	Expense (in 000)	% of Pay Base
Shift Differentials	$35,652	3.4*
Overtime	49,612	4.8*
Vacations	64,614	6.2*
Holidays	37,072	3.6*
Sick Leave	7,084	0.7*
Other Leave	6,313	0.6*
Bonuses	0	0
Severance (IEA)	3,801	0.4*
Other Benefits	4,014	0.4
TOTAL	$208,162	20.0(1)
Qualified Benefits		
Life Insurance	$21,547	2.1*
Sicknes & Accident	18,648	1.8*
Group Insurance	63,491	6.1
Pensions	40,571	3.9*
Other (S&S)	10,053	1.0*
	$154,310	14.8(1)

(1) Not Additive due to rounding.

* Wage related—current benefit cost will "roll-up" by applicable % of pay increases.